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(17,623.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 193.

THE INTERNATIONAL NAVIGATION COMPANY, PETITIONER,

vs.

THE FARR AND BAILEY MANUFACTURING COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 5, 1900.

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a *Transcript of Record.*

Filed August 22, 1899.

United States Circuit Court of Appeals for the Third Circuit, Sept. Term, 1899.

THE FARR AND BAILEY MANUFACTURING COMPANY, Libellant, Appellant,
vs.
THE INTERNATIONAL NAVIGATION COMPANY, Owner of the Steamship "Indiana," Respondent, Appellee. } No. 13.

Appeal from the district court of the United States for the eastern district of Pennsylvania.

1 In the District Court of the United States for the Eastern District of Pennsylvania. In Admiralty.

THE FARR AND BAILEY MANUFACTURING COMPANY
vs.
THE INTERNATIONAL NAVIGATION COMPANY, Owner of the Steamship "Indiana." } No. 62 of 1895.

Breach of contract of affreightment.

Pleas before the honorable the judge of the district court of the United States for the eastern district of Pennsylvania.

It is thus contained:

Be it remembered, that on the sixteenth day of August, A. D. 1895, Horace L. Cheyney, Esq., and John F. Lewis, Esq., proctors of said court, come into said court and exhibit the libel and complaint of The Farr and Bailey Manufacturing Company against The International Navigation Company, owner of the steamship "Indiana," in a cause of contract, civil and maritime, which being read is in the words and figures following, to wit:

Libel.

To the Honorable William Butler, judge of the district court of the United States for the eastern district of Pennsylvania:

The libel and complaint of the Farr and Bailey Manufacturing Company, of Camden, N. J., a corporation existing under the laws of the State of New Jersey, manufacturers of floor oilcloth, against the International Navigation Company, of the city of Philadelphia, in a cause of breach of contract of affreightment, civil and maritime, alleges as follows:

1. That at the time hereinafter mentioned, The International Navigation Company, respondents, were the owners of the steam-

ship "Indiana," one of the American line of steamships plying between Liverpool and Philadelphia, and were common carriers of chattels and goods for hire.

2 2. That on or about the 21st day of May, A. D. 1895, Richardson, Spence & Company, as agents of the libellants, delivered on board the steamship "Indiana," at Liverpool, in good order and condition, ten bales of burlap or packages of merchandise, the property of libellants, which the said International Navigation Company, by their agents, in consideration of certain freight agreed to be paid thereon, agreed to safely carry to the port of Philadelphia and there deliver the same in like good order and condition unto the Farr & Bailey Manufacturing Company, in like good order and condition as appears by a copy of the bill of lading delivered to the libellants, which is attached hereto, marked Exhibit "A" and make part hereof.

3. That upon the arrival of the said steamship "Indiana" at the port of Philadelphia, the said ten bales of burlap were greatly damaged by sea water and other causes, due, as the libellants are informed, to the unseaworthiness of the steamship "Indiana" at the time of her departure from Liverpool and to the negligence and mismanagement of the said vessel by her officers and crew.

4. The said goods were damaged in the sum of two thousand and eighty-four dollars and fifteen cents.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore the libellants pray that process in due form of law according to the course of this honorable court in admiralty and maritime causes may issue against the said International Navigation Company, and that they may be compelled to answer on oath all and singular the matters aforesaid, and that this honorable court will be pleased to decree payment of damages aforesaid, with interest and costs, and that they may have such other and further relief as in law and justice they may be entitled to receive.

COUNTY OF PHILADELPHIA, }
State of Pennsylvania. }

Edward L. Farr, being duly affirmed according to law, says that he is secretary and treasurer of the Farr and Bailey Manufacturing Company, and that the facts set forth in the foregoing libel are true to the best of his knowledge, information and belief.

(S'g'd) EDWARD L. FARR.

Affirmed and subscribed before me this ninth day of August, A. D. 1895.

BENJAMIN RUSH,
Notary Public.

[SEAL.]

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EXHIBIT A.

Copy of Bill of Lading.

Shipped, in apparent good order and condition, by Richardson, Spence & Co., Agents, to be transported by the Steamship called the "Indiana" and now lying in the Port of Liverpool, and bound for Philadelphia, with liberty to call at Queenstown, Ten packages merchandise being marked and numbered as in the margin; weight, measure, gauge, quality, condition, contents, and value unknown, and to be delivered in like good order and condition at the Port of Philadelphia, (or so near thereto as she may safely get) unto Messrs. Farr & Bailey Manufacturing Co. or to his or their assigns, he or they paying freight, primage, and charges as per margin (at the current rate of Exchange for Bankers Bills at sight on London, on the day of the Ship's arrival). General average payable according to the custom of the Port of Discharge.

It is mutually agreed that the Ship shall have liberty to sail without pilots; to tow and assist vessels in distress; to deviate for the purpose of saving life or property; that the Carrier shall have liberty to convey goods in lighters or steam tenders to and from the ship at the risk of the owners of the goods; and in case the ship shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage, to tranship the goods to their destination by any other steamship.

It is also mutually agreed that the Carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters; by fire from any cause or wheresoever occurring, by barratry of the master or crew; by enemies, pirates or robbers, by arrest and restraint of princes, rulers or people, riots, strikes, lock-outs or stoppage of labor; by explosion, bursting of boilers, breakage of shafts or any latent defect in hull or machinery, or appurtenances; by collisions, stranding, or other accidents of navigation, of whatsoever kind (even when occasioned by the negligence, default or error in judgment of the

pilot, master, mariners, or other servants of the shipowner, not resulting, however, in any case, from want of due diligence by the owners of the ship or any of them, or by the Ship's Husband or Manager, or by unseaworthiness of the Ship at the commencement or any period of the voyage (provided all reasonable means have been taken to provide against such unseaworthiness; nor by decay, heating, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage, arising from the nature of the goods, or the insufficiency of packages or wrappers; nor for land damage; nor for the obliteration, errors, insufficiency, or absence of marks, brands and numbers, address or description; nor for risk of craft, hulk or transhipment; nor for any loss or damage caused by the prolongation of the voyage.

1. It is also mutually agreed that the carrier shall not be liable for Gold, Silver, Bullion, Specie, Documents, Jewellery, Precious Stones, Statuary, Mosaics, Pictures, Embroideries, Perfumeries, Works of Art, Silks, Lace, Furs, China, Porcelain, Watches, or Clocks, or for goods of any description which are above the value of $500. per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made and extra freight paid.

2. Also, that Shippers shall be liable for any loss or damage to Ship or Cargo caused by inflammable, explosive or dangerous or injurious goods, shipped without full disclosure of their nature, whether such Shipper be Principal or Agent; and such goods may be thrown overboard or destroyed at any time without compensation.

3. Also, that the Shipowner is not liable for any claim notice of which is not given before the removal of the goods; nor for any claim for loss, short delivery, damage, or detention of goods, unless the ground of claim shall wholly arise while the goods are in the actual custody of the Shipowner; nor is the Shipowner in any case liable beyond the Invoice or de-

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clared value of the Goods, whichever shall be least. It is expressly stipulated that the Goods and Merchandise mentioned in this Bill of Lading, whilst being transhipped or awaiting shipment on any quay or lighter in Liverpool, or elsewhersoever, and also so soon as they are discharged over the Ship's side, shall be at the sole risk of the Shipper or Consignee. Goods which may require to be forwarded by Rail, Steamship, lighter, or otherwise to their port of shipment or to their destination from the Ship's port of discharge shall be so forwarded at Merchant's risk subject to the ordinary conditions of carriage of such Railway, Steamship, or other Carrier, or subject to any special terms required by them.

4. The Carrier shall have a lien on the goods for all freight, demurrage, damages, for detention, primage and charges, including land and water transport, charges incurred before shipment, and also for fines or damages, which the Ship or its Owners may incur, or suffer, by reason of the incorrect or insufficient markings, numbering or addressing, of packages, or description of their contents, or the dangerous or injurious nature thereof.

5. Also, that in case the ship shall be prevented from reaching her destination by Quarantine, the Shipowner may discharge the goods into any depot or Lazaretto, and such discharge shall be deemed a final delivery under this contract, and all the expenses thereby incurred on the goods shall be a lien thereon.

6. The Goods to be taken from alongside by the Consignee immediately the vessel is ready to discharge, without reference to the state of the weather, or otherwise they will be landed and deposited at the expense of the Consignee and at his risk of Fire, loss or injury, on the Dock or Wharf, or into Hulk or Lighter, or in the Warehouse provided for that purpose, or sent to the Public Store, as the Collector at the Port of Philadelphia shall direct, and when deposited in the Warehouse, to be subject to storage, the Collector of the

Port being hereby authorized to grant a general order for discharge immediately after arrival of the Ship.

7. Also, that in case the whole or any part of the Goods specified herein be prevented by any cause from going in said Steamer, the Shipowner is not to be under any liability if he forward them by succeeding Steamers, whether of this Line, or any steamer running in connection therewith.

8. Also, that the only condition on which Glass, Earthenware, or China will be carried is, that the Carrier shall not be held liable for any loss or injury which may occur whether from negligence or any other cause whatever.

9. Also that full freight is payable on damaged or unsound goods; but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

10. Also, that if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the Carrier shall be entitled to recover the difference from the Shipper.

11. Also, that this Bill of Lading, duly endorsed, be given up to the Ship's Consignee in Exchange for Delivery Order.

12. Also, that Freight Prepaid will not be returned, Goods lost or not lost.

13. Also, that parcels for different Consignees collected or made up in single packages addressed to one Consignee pay full freight on each parcel.

The liability of the carrier, under this bill of lading, shall be governed by the law of England, with reference to which law this contract is made.

And finally, in accepting this Bill of Lading, the Shipper, Owner, and Consignee of the goods, and the holder of the Bill of Lading agree to be bound by all its stipulations, exceptions and conditions, whether written or printed, as fully

as if they were all signed by such Shipper, Owner, Consignee, or Holder.

In witness whereof, the Master or Agent of the said ship hath affirmed to 3 bills of lading, all of this tenor and date, numbered consecutively, one of which being accomplished and given up to the Carrier, the others to stand void.

Dated in Liverpool, this 21st. day of May 1895.

(Signed.) W. H. CHISHOLM.

ON MARGIN:

F 180/189 10 Bales
B DUNDEE
Through rate from
Charges £20

Tons Cwt. Qrs. Lbs.
Freight on at per ton £
Freight on Ft. In. at per ton £
Primage per cent.
Total . . . . . £ Stg.

As per Agreement.

ON MARGIN:

The attention of Shippers is specially directed to the following extracts from the Merchant Shipping Act, 1873.

Section 23. If any person sends, or attempts to send by, or attempts to carry in any vessel any dangerous goods, *i. e.*, aquafortis, vitriol, naptha, benzine, gunpowder, lucifer matches, nitro glycerine, petroleum, or any other goods of a dangerous nature without distinctly marking their nature on the outside of the package, and giving written notice of the nature of the goods at or before the time of sending the same to be shipped or taking the same on board, he shall for every such offence incur a penalty not exceeding £100. Section 24. If any person knowingly sends, or attempts to send by, or carries or attempts to carry in any

vessel any dangerous goods, or goods of a dangerous nature, under a false description, or falsely describes the sender or carrier thereof, he shall incur a penalty not exceeding £500. By the 26th. Section the Master or Owner is empowered to throw dangerous goods overboard. By the 27th. Section such goods may be forfeited. Cargo likely to take fire, or cause damage to other goods, will therefore not knowingly be received, and Shippers of such will be liable for all consequences, and will also be prosecuted as the law directs.

Amendment to Libel.

And now, December , 1895, the libellants amend the libel as follows:

1. By substituting the word "twenty" for the word "ten" in fourth line of the second paragraph thereof.

2. By adding at the end of the second paragraph thereof "and by a bill of lading filed in the Custom House at Philadelphia."

3. By substituting the word "twenty" for the word "ten" in the second line of the third paragraph thereof.

DEPOSITIONS.

Testimony taken at the office of Messrs. Lewis & Cheyney, 430 Walnut Street, Philadelphia, October 16, 1895, at 11 o'clock, A. M.

Present—HORACE L. CHEYNEY, ESQ., for libellant.
J. RODMAN PAUL, ESQ., for respondent.

(Mr. Cheyney offers in evidence the bill of lading issued by the International Navigation Company, or their agents, to Richardson, Spence & Company, for the ten packages of merchandise in question.)

9 And afterwards, to wit, on the 31st day of July, A. D. 1896, J. Rodman Paul, Esq., one of the proctors of said court, comes into said court, and exhibits the answer of the International Navigation Company to the libel and complaint aforesaid, and the same being filed is in the words and figures following, to wit:

In the District Court of the United States for the Eastern District of Pennsylvania.

Answer.

To the Honorable William Butler, judge of the said court:

The answer of the International Navigation Company to the libel and complaint of the Farr and Bailey Manufacturing Company in a cause of breach of contract, of affreightment, civil and maritime, respectfully showeth:

1. It is true as stated in the first paragraph of the libel that the International Navigation Company were in May, 1895, owners of the steamship "Indiana," plying between Liverpool and Philadelphia, and were common carriers.

2. It is true as alleged in the second paragraph of the libel that ten bales of burlap consigned to libellants were delivered on board said steamship "Indiana" on or about May 21, 1895, and that a bill of lading therefor was given to libellants (a true copy of which is attached to the said libel) by which it appears said merchandise was received on board said steamship in "apparent good order and condition."

3. That the said steamship "Indiana" at the time of sailing from Liverpool and thereafter was staunch, strong, seaworthy and well equipped in every respect and was manned by a carefully selected and experienced ship's company of master, officers and crew. On arrival at Philadelphia respondent is informed that the said goods were somewhat damaged by sea water, but that the same were greatly damaged as alleged in the said paragraph of the libel or that said damage was due to the unseaworthiness of the said steamship "Indiana" at the time of her departure from Liverpool or otherwise, and for the negligence and mismanagement of the said vessel by her officers and crew, is denied.

4. It is denied that the said goods were damaged in the sum of $2,084.15, and it is asked that strict proof of the true amount of damage, if any, be made.

5. Respondent believes that the damage to the said goods was caused by sea water entering through a dead-light side port during the voyage, which side port was closed instantly when dis-
10 covered to be opened. Said dead-light side port was closed, fastened and in perfect condition when the vessel left Liverpool, and became open several days after through some cause or agency unknown to respondent.

6. That by the said bill of lading it is provided that the carrier shall not be liable for loss or damage occasioned by perils of the sea, and the said damage was due to a peril of the sea.

7. That by the said bill of lading it was further provided that the

carrier shall not be liable for loss occasioned by accidents of navigation of whatever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners or other, servant of the ship-owner, not resulting, however, in any case from want of due diligence by the owners of the ship or by unseaworthiness of the ship at the commencement or any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness, and that the said loss or damage, if any, was occasioned by an accident of navigation or management of the steamship and not by want of due diligence on the part of the owners or by unseaworthiness and all reasonable means have been taken by said owners to provide against unseaworthiness. Wherefore, by reasons of the said proviso and by reason also of the act of Congress in such case made and provided, the respondent is not liable.

8. It is further provided by the said bill of lading that the liability of the carrier thereunder should be governed by the law of England with reference to which the contract was made; that the said contract or bill of lading was made and entered into in England, and by the law of England the said steamship and her owners are not liable for the loss and damage aforesaid.

All and singular the premises are true.

Wherefore the respondent prays that the court pronounce against the libel aforesaid and condemn the libellant in costs and otherwise right and justice administer in the premises.

INTERNATIONAL NAVIGATION CO.,
By GEO. H. HIGBEE, *Manager.*

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

George H. Higbee, the manager of the respondent company, being duly sworn according to law, deposes and says that the facts set forth in the foregoing answer are true to the best of his knowledge, information and belief.

[SEAL.] GEO. H. HIGBEE.

Sworn and subscribed before me this 31st day of July, 1896.

ARCHER McLEARN,
Notary Public.

11 And afterwards, to wit, on the 24th day of March, 1899, the cause came on to be heard upon libel, answer, and proofs and statements of facts, and conclusions of law, as also depositions on behalf of the respective parties are presented, read, and filed, and the said depositions are in the words and figures following, to wit:

Depositions.

Testimony taken at the office of Messrs. Lewis & Cheyney, 430 Walnut street, Philadelphia, October 16, 1895, at 11 o'clock a. m.

Present: Horace L. Cheyney, Esq., for libellant; J. Rodman Paul, Esq., for respondent.

(Mr. Cheyney offers in evidence the bill of lading issued by the International Navigation Company, or their agents, to Richardson, Spence & Company, for the ten packages of merchandise in question.)

Copy of Bill of Lading.

Shipped, in apparent good order and condition, by Richardson, Spence & Co., Agents, to be transported by the Steamship called the "Indiana" and now lying in the Port of Liverpool, and bound for Philadelphia, with liberty to call at Queenstown, Ten packages merchandise being marked and numbered as in the margin; weight, measure, gauge, quality, condition, contents, and value unknown, and to be delivered in like good order and condition at the Port of Philadelphia, (or so near thereto as she may safely get) unto Messrs. Farr & Bailey Manufacturing Co. or to his or their assigns, he or they paying freight, primage, and charges as per margin (at the current rate of Exchange for Bankers Bills at sight on London, on the day of the Ship's arrival). General average payable according to the custom of the Port of Discharge.

It is mutually agreed that the Ship shall have liberty to sail without pilots; to tow and assist vessels in distress; to deviate for the purpose of saving life or property; that the Carrier shall have liberty to convey goods in lighters or steam tenders to and from the ship at the risk of the owners of the goods; and in case the ship shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage, to tranship the goods to their destination by any other steamship.

It is also mutually agreed that the Carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters; by fire from any cause or wheresoever occurring, by barratry of the master or crew; by enemies, pirates or robbers, by arrest and restraint of princes, rulers or people, riots, strikes, lock-outs or stoppage of labor; by explosion, bursting of boilers, breakage of shafts or any latent defect in hull or machinery, or appurtenances; by collisions, stranding, or other accidents of navigation, of whatsoever kind (even when occasioned by the negligence, default or error in judgment of the

pilot, master, mariners, or other servants of the shipowner, not resulting, however, in any case, from want of due diligence by the owners of the ship or any of them, or by the Ship's Husband or Manager, or by unseaworthiness of the Ship at the commencement or any period of the voyage (provided all reasonable means have been taken to provide against such unseaworthiness; nor by decay, heating, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage, arising from the nature of the goods, or the insufficiency of packages or wrappers; nor for land damage; nor for the obliteration, errors, insufficiency, or absence of marks, brands and numbers, address or description; nor for risk of craft, hulk or transhipment; nor for any loss or damage caused by the prolongation of the voyage.

1. It is also mutually agreed that the carrier shall not be liable for Gold, Silver, Bullion, Specie, Documents, Jewellery, Precious Stones, Statuary, Mosaics, Pictures, Embroideries, Perfumeries, Works of Art, Silks, Lace, Furs, China, Porcelain, Watches, or Clocks, or for goods of any description which are above the value of $500. per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made and extra freight paid.

2. Also, that Shippers shall be liable for any loss or damage to Ship or Cargo caused by inflammable, explosive or dangerous or injurious goods, shipped without full disclosure of their nature, whether such Shipper be Principal or Agent; and such goods may be thrown overboard or destroyed at any time without compensation.

3. Also, that the Shipowner is not liable for any claim notice of which is not given before the removal of the goods; nor for any claim for loss, short delivery, damage, or detention of goods, unless the ground of claim shall wholly arise while the goods are in the actual custody of the Shipowner; nor is the Shipowner in any case liable beyond the Invoice or de-

clared value of the Goods, whichever shall be least. It is expressly stipulated that the Goods and Merchandise mentioned in this Bill of Lading, whilst being transhipped or awaiting shipment on any quay or lighter in Liverpool, or elsewhersoever, and also so soon as they are discharged over the Ship's side, shall be at the sole risk of the Shipper or Consignee. Goods which may require to be forwarded by Rail, Steamship, lighter, or otherwise to their port of shipment or to their destination from the Ship's port of discharge shall be so forwarded at Merchant's risk subject to the ordinary conditions of carriage of such Railway, Steamship, or other Carrier, or subject to any special terms required by them.

4. The Carrier shall have a lien on the goods for all freight, demurrage, damages, for detention, primage and charges, including land and water transport, charges incurred before shipment, and also for fines or damages, which the Ship or its Owners may incur, or suffer, by reason of the incorrect or insufficient markings, numbering or addressing, of packages, or description of their contents, or the dangerous or injurious nature thereof.

5. Also, that in case the ship shall be prevented from reaching her destination by Quarantine, the Shipowner may discharge the goods into any depot or Lazaretto, and such discharge shall be deemed a final delivery under this contract, and all the expenses thereby incurred on the goods shall be a lien thereon.

6. The Goods to be taken from alongside by the Consignee immediately the vessel is ready to discharge, without reference to the state of the weather, or otherwise they will be landed and deposited at the expense of the Consignee and at his risk of Fire, loss or injury, on the Dock or Wharf, or into Hulk or Lighter, or in the Warehouse provided for that purpose, or sent to the Public Store, as the Collector at the Port of Philadelphia shall direct, and when deposited in the Warehouse, to be subject to storage, the Collector of the

Port being hereby authorized to grant a general order for discharge immediately after arrival of the Ship.

7. Also, that in case the whole or any part of the Goods specified herein be prevented by any cause from going in said Steamer, the Shipowner is not to be under any liability if he forward them by succeeding Steamers, whether of this Line, or any steamer running in connection therewith.

8. Also, that the only condition on which Glass, Earthenware, or China will be carried is, that the Carrier shall not be held liable for any loss or injury which may occur whether from negligence or any other cause whatever.

9. Also that full freight is payable on damaged or unsound goods; but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

10. Also, that if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the Carrier shall be entitled to recover the difference from the Shipper.

11. Also, that this Bill of Lading, duly endorsed, be given up to the Ship's Consignee in Exchange for Delivery Order.

12. Also, that Freight Prepaid will not be returned, Goods lost or not lost.

13. Also, that parcels for different Consignees collected or made up in single packages addressed to one Consignee pay full freight on each parcel.

The liability of the carrier, under this bill of lading, shall be governed by the law of England, with reference to which law this contract is made.

And finally, in accepting this Bill of Lading, the Shipper, Owner, and Consignee of the goods, and the holder of the Bill of Lading agree to be bound by all its stipulations, exceptions and conditions, whether written or printed, as fully

as if they were all signed by such Shipper, Owner, Consignee, or Holder.

In witness whereof, the Master or Agent of the said ship hath affirmed to 3 bills of lading, all of this tenor and date, numbered consecutively, one of which being accomplished and given up to the Carrier, the others to stand void.

Dated in Liverpool, this 21st. day of May 1895.

(Signed.) W. H. CHISHOLM.

ON MARGIN:

F 180/189 10 Bales
B DUNDEE
Through rate from
Charges £20

Tons Cwt. Qrs. Lbs.
Freight on at per ton £
Freight on Ft. In. at per ton £
Primage per cent.
Total . . . . . £ Stg.

As per Agreement.

ON MARGIN:

The attention of Shippers is specially directed to the following extracts from the Merchant Shipping Act, 1873.

Section 23. If any person sends, or attempts to send by, or attempts to carry in any vessel any dangerous goods, *i. e.*, aquafortis, vitriol, naptha, benzine, gunpowder, lucifer matches, nitro glycerine, petroleum, or any other goods of a dangerous nature without distinctly marking their nature on the outside of the package, and giving written notice of the nature of the goods at or before the time of sending the same to be shipped or taking the same on board, he shall for every such offence incur a penalty not exceeding £100. Section 24. If any person knowingly sends, or attempts to send by, or carries or attempts to carry in any

vessel any dangerous goods, or goods of a dangerous nature, under a false description, or falslely describes the sender or carrier thereof, he shall incur a penalty not exceeding £500. By the 26th. Section the Master or Owner is empowered to throw dangerous goods overboard. By the 27th. Section such goods may be forfeited. Cargo likely to take fire, or cause damage to other goods, will therefore not knowingly be received, and Shippers of such will be liable for all consequences, and will also be prosecuted as the law directs.

Depositions taken in behalf of the libellant at the offices of Messrs. Lewis & Cheyney, Rooms 348-349 Bourse Building, Philadelphia, on Tuesday, November 26, 1895, at three o'clock P. M.

Present—HORACE L. CHEYNEY, Esq., for libellant.
J. RODMAN PAUL, Esq., for Respondent.

(Mr. Cheyney gives notice that he will file an amendment to the libel, changing the claim of damage to twenty bales o burlap instead of ten bales; the damage to the twenty bales of burlap being the amount set forth in the libel, ($2,084.15.)

LODGE COLTON being duly sworn according to law, was examined as follows:

By Mr. CHEYNEY:

Q. Captain, what is your business?

A. I am surveyor of the Insurance Company of North America.

Q. How long have you been in the Insurance Company of North America?

A. Four years.

Q. What was your occupation prior to that time?

A. Master mariner.

Q. How long did you serve as master mariner?

A. Twenty-five or thirty years.

Q. What are your duties as surveyor of the Insurance Company of North America?

A. To examine vessels and damaged goods.

Q. Do you remember making an examination of certain goods which arrived by the steamship "Indiana" from Liverpool June 7th last?

A. Yes, sir.

Q. Do you remember examining the twenty bales of burlap consigned to the Farr & Bailey Manufacturing Company?

A. Yes, sir.

Q. Where did you see those goods?

A. On the wharf.

Q. With whom did you go there?

A. With Mr. Farr.

Q. Mr. Farr is of the Farr & Bailey Manufacturing Company?

A. Yes, sir.

Q. Did you see any one there connected with the steamship?

A. No one but the clerks on the wharf.

Q. What was the condition of the twenty bales of burlap which I have mentioned?

A. They were all very badly damaged with water and dirt. Some of them so much that they had swollen and broken the bands.

Q. Is that a part of your duty as surveyor of the Insurance Company of North America to make any appraisement of the amount of damage to the goods?

A. I do at times.

Q. Did you upon this shipment?

A. No, sir; I requested Mr. Farr to do the best he could to save it and do the best he could for all parties concerned.

Q. Do you know where these goods were stowed, these twenty bales of burlap?

A. I understood they were stowed in No. 3 lower between decks.

Q. Did you make any examination of that hold?

A. I did.

Q. When?

A. At the same time I examined the goods on the wharf.

Q. Were there any goods at that time in the hold?

A. Yes, sir; at the time there was a little cargo on the bottom of the boat.

Q. Did you notice anything defective at that time about the condition of that hold?

A. I noticed that they had been cleaning around there on the upper portion of the deck and I also noticed that they had one new dead light—one new guard on the forward dead light.

Q. What is there over the No. 3 between decks?

A. The washing room and water closet for steerage passengers.

Q. Do you remember how many dead lights there were in that hold?

A. Four; two on each side.

Q. Did you have any conversation with any of the officers of the International Navigation Company with regard to the twenty bales of burlap?

(Objected to by Mr. Paul as irrelevant.)

A. I think I spoke to Mr. H. C. Bye about them being damaged. I met him on the street and I spoke to him about them. I requested him to look at it. I don't recollect about speaking to Mr. Wallace, the wharf superintendent.

CROSS EXAMINATION.

By MR. PAUL:

× *Q.* How high are these dead lights that you speak of? I mean from the floor of the hold up?

A. Well, I should say, Mr. Paul, without knowing exactly, I should say they were close on to six feet. I didn't measure the distance.

× *Q.* Did you take any observation of those lights from the outside?

A. I noticed they were glass and the glass at the time I was there was closed up.

×*Q.* And in one of these you noticed what?

A. I noticed a new guard on the forward port side.

×*Q.* What is the guard?

A. It is a cover on the inside to keep the goods from coming against the glass and breaking it.

×*Q.* That sometimes happens in cargoes? If guards are not placed there the cargoes will break them?

A. Yes, sir.

×*Q.* And so that water will not come in?

A. Yes, sir.

×*Q.* Do you think that was probably the cause of the damage in this case?

A. Oh, I couldn't say.

×*Q.* What do you think was the cause?

A. I couldn't say, because the guard was there when I examined her.

×*Q.* And if the guard had not been there, it would have happened in that way?

A. I am sure that they had a guard, because the place for a guard was there.

×*Q.* Do you remember which one of those ports had this new guard?

A. The forward one on the port side.

×*Q.* Did you notice sufficiently of the vessel or these ports, to say how high above the ordinary sea level they would be from the outside when loaded?

A. I didn't examine her outside closely. I couldn't tell that.

×*Q.* You couldn't tell that?

A. No, sir; but I am pretty sure that they wouldn't be so high that the sea would swash up over them.

×*Q.* Your only knowledge of this burlap is because Mr. Farr pointed it out to you?

A. I examined the burlap.

×*Q.* Your only knowledge that this was the burlap consigned to Mr. Farr was that he pointed it out to you on the wharf as his consignment?

A. I had the marks of them. I was sent down to examine them and the clerk on the wharf showed me where it was, the goods.

By Mr. Cheyney:

×*Q.* Is that clerk in the employ of the International Navigation Company?

A. Yes, sir.

(Mr. Cheyney offers in evidence letter dated June 12, 1895, and July 8, 1895, marked "W. H. S. Jr., November 26, 1895," copies of which are hereto attached.)

By Mr. Paul:

×*Q.* Have you any idea of the time they had been wet?

A. I don't know the time, but it certainly must have been not less than four or five days, because I think it would take that long to heat the way they were. They were very hot inside. They were that warm that they were mildew from the excessive heat.

×*Q.* Do you know how long before you saw them, they arrived there?

A. I think the ship had been, I am not positive about that, but I think the ship had been in two or three days.

(Signature waived.)

Copies of Letters Offered in Evidence and Marked "W. H. S. Jr., November 26th. 1895."

AMERICAN LINE. RED STAR LINE.

Cable Address
Internavco.

SAMUEL BETTLE
General Freight Agent.
H. C. BYE,
West Bound Freight Agent.

INTERNATIONAL NAVIGATION COMPANY.
305 and 307 Walnut Street.

Philadelphia, June 12th. 1895.

MESSRS. FARR & BAILEY MFG. CO.
Camden, N. J.

DEAR SIRS:

Referring to your shipment of 20 bales of Burlaps by S.S. "Indiana" damaged by Water.

We have investigated the cause of this damage as thoroughly as possible, and fail to find that the trouble was due to any carelessness or neglect on the part of the ship, and as the damage was caused by salt water, the underwriters, in our opinion, are liable for the loss.

The Surveyors have not yet filed their report, and we do not know their opinion on the matter yet we would suggest however that you request your underwriters to send some to examine the goods and advise you as to disposition of same. The goods should be disposed of to the very best advantage, possible, and the question of liability can be determined afterwards.

Yours truly,

(S'g'd) H. C. BYE,
West Bound Freight Agent.

Philadelphia, July 8th. 1895.

MESSRS. FARR & BAILEY MFG. CO.
Camden, N. J.

DEAR SIRS :—

We have to acknowledge receipt of your favor of 5th. inst. enclosing claim amounting to $2164.00, against S.S. "Indiana" arrived June 6th., for damage by water to shipment of Burlap.

The Surveyors' Report on the cargo of this vessel shows that the water had entered through a dead light side port during the voyage. We do not consider that the vessel is liable for this damage and must therefore refer you to your underwriters for settlement of your claim.

Yours truly,

(S'gd) H. C. BYE,
West Bound Freight Agent.

Testimony taken in behalf of libellant at 348 Bourse Building, December 12, 1895, at 2.30 P. M.

Present—HORACE L. CHEYNEY, Esq., for libellant.
J. RODMAN PAUL, Esq., for respondent.

S. H. JOHNSON, being duly sworn according to law, says :

By MR. CHEYNEY :

Q. What is your business?

A. I am custodian of the records of the Custom House?

Q. You have been subpœnaed to produce bill of lading for ten bales of burlaps shipped from Liverpool about May 21, 1895, on the steamship "Indiana" and marked "G. X. 2304 to 2313." Please state whether you have produced it.

A. I have produced it. This is the bill of lading which is filed in the Custom House.

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(The bill of lading produced after being compared by Messrs. Paul and Cheyney is found to be in all respects identical to the one heretofore offered in evidence, except the marks upon the margin were "G. X. 2304/313" instead of "F. B. 180/189." The invoice accompanying the bill of lading shows the value of the property to be 308 pounds 14 shillings and 6 pence.)

Depositions taken on behalf of the libellant, at the offices of Messrs. Lewis & Cheyney, Rooms, 348-349 Bourse Building, Philadelphia, on Friday, October, 8, 1897, at 3 o'clock P. M.

Present—HORACE L. CHEYNEY, ESQ., for libellant.
J. RODMAN PAUL, ESQ., for respondent.

LODGE COLTON, being recalled, was examined as follows:

By MR. CHEYNEY:

Q. You have already been sworn as a witness in this case, I believe?

A. Yes, sir; some time ago.

Q. What is your occupation at the present time?

A. The same position, Insurance Company of North America.

Q. You are the surveyor of the Insurance Company of North America?

A. Yes, sir.

Q. How long have you been with them?

A. I have been with them since April, 1892.

Q. You went to sea prior to that time?

A. Yes, sir.

Q. How many years were you at sea?

A. 43 or 45 years, somewheres about that.

Q. In what capacity did you go to sea?

A. The last was master of a vessel.

Q. Have you served in all capacities at sea?

A. All of them, I went as boy first.

Q. Have you served on steam and sailing vessels?

A. Yes, sir.

Q. What vessels have you been master of, steam vessels?

A. My last one was the steamship "Cienfuegos."

Q. What other steam vessels?

A. The one before was the "Santiago," the other before that was the "Niagara" and the one before was the "C. W. Lord," I commanded quite a number of steamers.

Q. I believe you were commodore of the Ward Line at one time?

A. Yes, sir.

Q. In your experience as a seaman or during your life as a seaman and surveyor of the Insurance Company of North America have you or not frequently had an occasion to examine dead lights of vessels?

A. Yes, sir; I have made them quite often.

Q. And you are familiar with their construction are you not?

A. Yes, sir.

Q. It has been testified to in this case by the officer of the steamship "Indiana" that prior to the departure of that vessel from Liverpool, that he, together with the carpenter, I believe, went into the hold where the cargo was stowed and screwed down the various dead lights. It is admitted that some time during the voyage one of the dead lights in that hold became open. Please state in your experience what could cause that dead light to get open during the voyage, assuming that it had been properly secured as testified to by the third officer before the departure from Liverpool?

(Objected to by Mr. Paul because all the facts are not sufficiently stated.)

A. I cannot imagine, Mr. Cheyney, if the dead light was securely screwed down, without somebody went down and and opened it, or from defects, that it would come open.

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Q. The only means by which you think it could be opened was some person opening it or a defect in its construction?

A. I don't think it could possibly come open if everything was screwed. I don't see how it could possibly come open without it received a blow from the outside which the broken glass would show.

Q. Have you in your experience at sea or as a surveyor, ever known a dead light to come open from the force of the water outside?

A. I never have, no, sir.

Q. In your opinion, could a dead light properly screwed and in good condition, become open by a blow from the outside without breaking the glass?

A. I don't think it could, sir.

Q. I think you went down to see the steamship "Indiana" shortly after this cargo arrived, did you not?

A. I was down aboard of her, yes, sir. After it was reported to us that she had damage, I went down to look at the ship and at that time all of the cargo had deen discharged and they were taking in an outward freight.

Q. Did you examine the port dead lights?

A. I looked at them. They were screwed up, but they had all been overhauled before that, so I had been informed, and they looked all right at that time,

Q. Who informed you that they had been overhauled? (Objected by Mr. Paul.)

A. The Carpenter.

By MR. PAUL:

Q. You mean ship's carpenter?

A. I judge he was the ship's carpenter, Mr. Paul.

By MR. CHEYNEY:

Q. Did you see any evidence of any protection made to any of the dead lights?

A. Oh, yes, they had inside what we call a protection to

the dead light, a blind light. There was a new blind light here on one port.

Q. That is constructed of iron, isn't it?

A. Yes, sir, what they call a blind light, and it also showed evidence underneath the dead light where a little water had run down from something or other.

(Objected to by Mr. Paul.)

Q. In your examination of the hold of that vessel in which this cargo was loaded, did you see any other source from which water could have leaked into the hold?

A. Well, she has a tank, I think she has fresh water just forward of that bulkhead and on the starboard side there is a wash room over it on the forward part and it would have to be a very large quanitity of water to leak from that because they would see it and if this washroom was on other side I should think they could see it if the pipe would break.

CROSS EXAMINATION.

By MR. PAUL:

×*Q.* Which dead light did you say had been overhauled?

A. One of the port lights, the forward dead light.

×*Q.* What compartment?

A. No. 3 orlop deck, in that compartment.

×*Q* The port side forward?

A. Yes, sir.

×*Q.* You don't know, of course, of your own knowledge, through which port light it is supposed this water came?

A. No, sir.

By MR. CHEYNEY:

×*Q.* The hold you refer to was the one in which this cargo was stowed?

A. The one in which this cargo was damaged, because I was requested to go down and look in regards to it, and

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Captain Wallace, and also there was a man by the name of Walsh was there, I think he is an engineer on the line.

×*Q.* Captain, I wish you would look at this dead light which I will put a tag on and mark in some way and state whether this is similiar in construction to the dead lights the "Indiana" had according to your recollection?

A. No, Mr. Cheyney, I think the dead light on the "Indiana" was a little smaller and the blind came up this way (indicating.)

(Mr. Paul states that the exact model can be produced.)

(Signature waived)

6. That by the said Bill of Lading it is provided that the carrier shall not be liable for loss or damage occasioned by perils of the sea, and the said damage was due to a peril of the sea.

7. That by the said Bill of Lading it was further provided that the carrier shall not be liable for loss occasioned by accidents of navigation of whatever kind, even when occasioned by the negligence, default or error in judgment by the pilot, master mariners or other servant of the ship owner not resulting however in any case from want of due diligence by the owners of the ship or by unseaworthiness of the ship at the commencement or any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness, and that the said loss or damage, if any, was occasioned by an accident of navigation or management of the steamship and not by want of due diligence on the part of the owners or by unseaworthiness and all reasonable means have been taken by said owners to provide against unseaworthiness. Wherefore, by reasons of the said proviso and by reason also of the Act of Congress in such case made and provided, the respondent is not liable.

8. It is further provided by the said Bill of Lading that the liability of the carrier thereunder should be governed by the law of England with reference to which the contract was made; that the said contract or Bill of Lading was made and entered into in England, and by the law of England the said steamship and her owners are not liable for the loss and damage aforesaid.

All and singular the premises are true.

Wherefore, the respondent prays that the Court pronounce against the Libel aforesaid and condemn the libellant in costs and otherwise right and justice administer in the premises.

INTERNATIONAL NAVIGATION CO.

By GEO. H. HIGBEE, Manager.

Eastern District of Pennsylvania, ss.

George H. Higbee, the manager of the respondent company, being duly sworn according to law, deposes and says that the facts set forth in the foregoing answer are true to the best of his knowledge, information and belief.

{SEAL} GEO. H. HIGBEE.

Sworn and subscribed before me this 31st day of July, 1896.

ARCHER McLEARN, Notary Public.

DEPOSITIONS.

COMMISSION TO ENGLAND.

INTERROGATORIES TO BE ANSWERED BY JOHN MILLER, OF LIVERPOOL, A WITNESS ON BEHALF OF THE RESPONDENT.

JOHN MILLER of lawful age being produced, sworn and examined on the part of the Respondents, deposeth and saith :—

1. Do you know the Libellant and the Respondent or either of them in this case? If so, how long have you known them?

To the first interrogatory he saith :—I do not know the Libellant but I do know the Respondent. I have known the Respondent International Navigation Company for over twelve years.

2. What is your age, residence and present occupation?

To the second interrogatory he saith:—My age is about 46 years. My residence is at 16 North Dingle Kirkdale in the County of Lancaster, but I am at present an inmate of the Royal Infirmary in the City of Liverpool. I am by occupation a ship carpenter. While I am in the Infirmary I am of course without occupation.

3. Have you followed the sea, and if so, for how long? and in what capacity?

To the third interrogatory he saith:—I have been at sea for about twenty-three years and all the time as a ship's carpenter.

4. Were you carpenter on board the steamship "Indiana," in June, 1895? and on the voyage from Liverpool to Philadelphia, leaving Liverpool, May 22nd, 1895.

To the fourth interrogatory he saith:—I was carpenter on board the S. S. "Indiana," in June, 1895, and was so on the voyage from Liverpool to Philadelphia, leaving Liverpool, May 22nd, 1895.

5. What is your duty as carpenter with reference to the inspection of the ports or deadlights and the various holds of the steamship before leaving port? and if you answer that it is your duty to inspect the ports and deadlights in the various holds, please answer fully whether or not you inspected the same on board the steamship "Indiana" prior to the voyage in question.

To the fifth interrogatory he saith:—My duty as carpenter with reference to the inspection of the ports or deadlights of the various holds of the steamship before leaving port was as soon as the inward cargo was discharged to see that the scuppers were cleaned and all the port lights and dummy covers, fastening nuts and bolts of the ports were in order and to make them perfectly tight. It was my duty to inspect each one of the ports in every hold all round the ship. I had also to see that all the ports

were securely closed before the cargo was taken in and the vessel sailed. I made such inspection of the ports or deadlights in the steamship "Indiana" prior to the voyage in question.

6. State especially whether you inspected No. 3 lower steerage; that is, that third hold from the bottom, and second below the main deck of the steamship "Indiana," and if so, exactly when and how you examined the deadlights or ports of this hold, especially those on the starboard side; state specifically what you found to be the condition as to the fastenings, screws, bolts, iron covers, and other parts of the ports. Whether or not any of them were opened between the time you inspected them and the time of sailing? What was the time of sailing?

To the sixth interrogatory he saith:—I inspected No. 3 lower steerage, that is, the third hold from the bottom and the second below the main deck of the steamship "Indiana" on the day before the vessel sailed and before any cargo was taken into the lower steerage. I personally examined each port light and dummy and the nuts, bolts and screws fixing the same, and tried them to see that they were in proper order. The Marine Superintendent, Captain Collins, was present. I did this with those on the starboard side, examining the ports first on one side of the ship and then on the other. I found the fastenings, screws, bolts, lights and iron covers and all the other parts of the ports in perfect order and condition. I saw the ports securely closed and screwed up and the dummies or covers screwed down over them. This was on the afternoon of the day before the vessel sailed, and so far as I know none of the ports were opened between the time. I inspected them and the time of sailing. The carpenters in the shore gang who were down in the hold last and put on the hatches reported to me in the regular

course, and they said the ports were closed and all secure when they closed the compartment. I was down there when cargo was coming in and they were then closed as I had left them. It would have been against the rules of the service for any one to open the ports after I had closed them. and so far as I know they were not opened. We sailed about three o'clock in the afternoon of the 22d May, 1895.

7. How high was the cargo stowed in the hold in question when you sailed from Liverpool? Were the ports covered by it or not, and could or could not one pass over it readily from the hatch to the port?

To the seventh interrogatory he saith:—There was only one ground tier of cargo in the hold in question. It went right across from side to side of the ship and it was chocked off. The ports were not covered by it and any one could pass over it readily from the hatch to the port.

8. When did you next see that hold, and what led you to go into it? What did you find there; if you passed from the hatch to the port, was there any difficulty in so doing? What did you do with reference to the port? If you shut it, was there any time or difficulty in so doing? What was the condition of the screws and bolts at that time?

To the eighth interrogatory he saith:—I next saw that hold to the best of my recollection about six or seven days after leaving Liverpool. It was part of my regular duty to take soundings each day of each compartment of the vessel, and on the fourth or fifth day I had found by sounding that there was a quantity of water in No. 3 hold and also in numbers 1 and 2 holds. I immediately reported the matter to the Captain and Chief Engineer and the water was pumped out, but the second day afterwards the Chief Engineer came to me about 7.30 a. m., when I was serving out water to the passengers, and said

he was afraid that there was a leak in No. 3 orlop and asked me whether I had any suspicion of it. I said no, the ship was all right when she left Liverpool. He said he was going down to examine the place, and I went and reported to the Captain along with the Chief Engineer, and the Captain instructed me to give the Chief Engineer every assistance. When we got the cover off the hatch a deck hand who was assisting in doing so said: "I can see daylight down there." I said, "Throw the hatch off," and I jumped down into the hold and found the after port on the starboard side wide open and the sea coming in the full bore of the opening and washing clean across the ship when she rolled. There was no difficulty in passing from the hatch to the port. I shut and screwed up the port at once and screwed down the cover. I did it at once and there was no time or difficulty in doing so. The screws and bolts had been unscrewed so as to allow the port and cover to be opened, but there was no difficulty in screwing them back again and the port and dummy cover were both closed and safely secured.

9. Were any repairs necessary to the port in question, its fastenings or cover at that time, or upon arrival in Philadelphia.

To the ninth interrogatory he saith:—No repairs were necessary to the port in question, its fastenings or cover, either at that time or upon the ship's arrival at Philadelphia.

10. Do you know of cargo being damaged upon that voyage, and if so, do you know by what it was caused.

To the tenth interrogatory he saith:—The cargo in that compartment was damaged by water coming through the port. I know of no other damaged cargo in this ship.

11. What was the distance below the deck above of the port in question; what was the distance of the port from the deck below; what was the distance of the port

above the ordinary load water line; was the port open at the time of leaving Liverpool? If you answer it was not, give your reason for so answering.

To the eleventh interrogatory he saith:—The port in question was about 3 feet below the deck above and about 4 feet 6 inches above the deck below. I cannot say what would be the distance of the port above the ordinary load water line as I never checked it. The port was not open at the time of leaving Liverpool. I say it was not because I went round the compartment on the afternoon previous to our sailing at the time the cargo was coming in and it was then closed. I was not in the compartment again before the ship sailed but the two shore carpenters, John Lloyd and Tom Kelly, were there and they battened down the hatch and reported to me that the ports and everything were secured below.

12. If you know any other matter or thing, favorable to the Respondent, please state it, without being specifically interrogated thereto.

To the twelfth interrogatory he saith:—I have nothing to add.

CROSS-INTERROGATORIES ON BEHALF OF LIBELLANT, TO JOHN MILLER, A WITNESS TO BE EXAMINED UNDER RESPONDENT'S COMMISSION TO LIVERPOOL, ENGLAND.

1. If you answer to the eighth interrogatory that you found one of the ports open, state fully if within your knowledge.

In answer to the first cross-interrogatory he saith:—It must have been opened by some person, but I cannot say by whom.

2. State whether any repairs to this port or deadlight or the cover were made upon the arrival of the vessel at Philadelphia or thereafter.

In answer to the second cross-interrogatory he saith:—No repairs were done to this port or deadlight or the cover either upon the arrival of the vessel at Philadelphia, nor so far as I am aware have any been done since. None were done while I was by the ship and I remained in her to the close of the year.

(Signed) JOHN MILLER.

SUPPLEMENTAL COMMISSION TO ENGLAND.

INTERROGATORIES TO BE ANSWERED BY JOSEPH LEACH, RICHARD DONBAVAND AND THOMAS KELLY, WITNESSES ON BEHALF OF THE RESPONDENT.

JOSEPH LEACH of 51 Somerville Road, Waterloo, in the County of Lancaster, foreman stevedore, aged 65 years and upwards, being duly sworn and examined on the part of the Defendant, doth depose and say as follows:

1. Do you know the Libellant and Respondent or either of them in this case? If so, how long have you known them?

To the first interrogatory he says:—I do not know the Libellants but I do know the Respondents. I have nown them for about twenty years.

2. What is your age, residence and present occupation?

To the second interrogatory he says:—My age is 65 years, my residence is at 51 Somerville Road, Waterloo, in the County of Lancaster, and my present occupation that of a foreman stevedore.

3. Where were you employed on May 22nd, 1895 and did your occupation cause you to be on board the steamship "Indiana" prior to leaving Liverpool on May 22nd, 1895?

To the third interrogatory he says:—I am in the permanent employ of Messieurs Mack & Durant of Liverpool, master stevedores, and was in their employ on the 22nd May, 1895. Having been working late the previous night, I was not working on that day. My occupation did cause me to be on board the S. S. "Indiana" prior to her leaving Liverpool on the 22nd May, 1895, viz: On the 21st May when I was on board her throughout the day and until late at night superintending the stowage of the cargo. I superintended the stowage of the cargo on the No. 3 lower steerage, and I finally left the vessel about 11 p. m. of the 21st May.

4. Were you on May 22nd in any of the holds of the steamship "Indiana," especially No. 3 lower steerage; that is, the third hold from the bottom and the second below the main deck of the steamship; and if so, when were you last there prior to the sailing of the steamship on the voyage in question?

To the fourth interrogatory he says: I was not in any of the holds of the S. S. "Indiana" on the 22nd May, 1895.

5. If you were in No. 3 lower steerage at the date in question, state whether you observed the deadlight ports of this hold, especially those on the starboard side; whether the same were closed or open, and what was the condition of the fastenings, screws, nuts, bolts, iron covers and other parts of said ports. Was the after deadlight port starboard side of said hold open or shut, and what was its condition?

To the fifth interrogatory he says:—I have already stated that I was not in No. 3 lower steerage on the 22nd May, 1895.

6. How high was the cargo stowed in the hold in question on that voyage; were the ports covered by it or not, and could or could not one pass over it reaching from the hatch to the port? How long after you last saw the hold in question did the vessel sail and how long after you left the hold were its hatches battened down?

To the sixth interrogatory he says:—When I was last in the No. 3 lower steerage on the 21st May, 1895, there was one tier of cargo lying on dunnage on the deck extending from side to side of the ship. There was only the one tier of cargo in that hold and it did not reach or cover the ports. Anyone could pass readily over it from the hatch to the port. I was last in the hold in question about 11 p. m. of the 21st May, and the vessel left the dock I believe about 8 a. m. of the 22nd May and sailed from the port in the afternoon. I cannot say how long it was after I left the hold that the hatches were battened down.

7. If you know any other matter or thing favorable to the Respondent, please state it, without being specifically interrogated thereto.

To the seventh interrogatory he says:—When I was in No. 3 lower steerage on the 21st May, I noticed the ports or deadlights of the hold, including those on the starboard side. The ports were closed and the dummies fastened down and screwed tight. The after deadlight port on the starboard side was properly closed and fastened. I am confident of this from my own personal observation. It is a rule of the service that the deadlights and dummies are closed by the ship's carpenter before the vessel begins to take cargo in, and after they have been closed they are not opened again under any circumstances. At the same time it is my regular duty to see that the ports have been closed so as to be quite certain that nothing is wrong.

CROSS-INTERROGATORIES.

1. If in answer to the fifth interrogatory you say that you observed the after deadlight port on the starboard side of No. 3 lower steerage, and if you describe its condition then state whether you observed all the other ports of said hold. If you answer that you did, describe the condition of each fully. State whether there was anything in the condition of the after port which caused your attention to be directed to it.

To the first cross-interrogatory he says:—I observed all the ports in the No. 3 lower steerage. As foreman stevedore it was my duty to be in the compartment while cargo was coming in, and as part of my regular duty I noticed the condition of the various ports, and I am positive that they were closed. There was nothing to draw my attention to the after port on the starboard side more than any other.

2. When was your attention first called to the condition of the after port of No. 3 lower steerage, starboard side, upon her departure from Liverpool on May 23rd, 1895, and by whom?

To the second cross-interrogatory he says:—No one called my attention to the condition of the after part of the No. 3 lower steerage on the starboard side upon the departure of the vessel from Liverpool. I looked at it in the same way as I did the other ports.

3. Were you in No. 3 lower steerage of the steamship "Indiana" before she sailed on the next following voyage for Liverpool. If you answer that you were, state whether the after port starboard side had been repaired in any way since the voyage of May 23rd, 1895.

To the third cross-interrogatory he says:—I was not in No. 3 lower steerage of the "Indiana" before she sailed on the next following voyage for Liverpool, but I was there before she sailed on the next following voyage from Liverpool. The after port on the starboard side had not in any way been repaired since the voyage of May 23rd, 1895.

4. If you have been in No. 3 lower steerage of the steamship "Indiana" prior to her sailing on any voyage since May 23rd, 1895, state fully the condition of the after port on the starboard side prior to her departure.

To the fourth cross-interrogatory he says:—I have been in the No. 3 lower steerage of the steamship "Indiana" prior to her sailing on several voyages since May 23rd, 1895. The after port on the starboard side of the No. 3 lower steerage has always been closed and screwed up in the same way as it was on the voyage in question.

5. If in answer to the fifth interrogatory you say that the after deadlight port on the starboard side was closed, state whether the iron port cover was also closed.

To the fifth cross-interrogatory he says:—the iron port cover was also closed.

6. State fully what cargo was in No. 3 lower steerage of the "Indiana" on her voyage from Liverpool, on May 23rd, 1895.

To the sixth cross-interrogatory he says:—There were Dundee canvas bales, boxes of tin, cases of machinery, and some transit goods, but I do not know their nature.

Richard Donbavand of 33 Virginia Street, Bootle, in the County of Lancaster, hatch foreman stevedore, being duly sworn and examined on the part of the Defendants, doth depose and say as follows:—

1. Do you know the Libellant and Respondent or either of them in this case? If so, how long have you known them?

To the first interrogatory he says:—I do not know the Libellants but I do know the Respondents and have known them for about twenty years.

2. What is your age, residence and present occupation?

To the second interrogatory he says:—My age is 52 years. My residence 33 Virginia Street, Bootle, in the County of Lancaster, and my occupation that of head foreman stevedore for Messieurs Mack and Durant of Liverpool, master stevedores.

3. Where were you employed on May 22nd, 1895, and did your occupation cause you to be on board the steamship "Indiana" prior to leaving Liverpool on May 22nd, 1895?

To the third interrogatory he says:—I was employed on the 22nd May, 1895, on board the S. S. "Indiana" until we had finished the stowage of the cargo about 4 a. m. She left the dock to go into the river about 8 a. m., and left the port the same afternoon.

4. Were you on May 22nd in any of the holds of the steamship "Indiana," especially No. 3 lower steerage; that is, the third hold from the bottom and the second below the main deck of the steamship; and if so, when were you last there prior to the sailing of the steamship on the voyage in question?

To the fourth interrogatory he says:—I was through all the holds of the steamship "Indiana" on the 22nd May, and especially through the No. 3 lower steerage. I was last in the No. 3 lower steerage about 1.45 a. m. of the 22nd May.

5. If you were in No. 3 lower steerage at the date in question, state whether you observed the deadlight ports of this hold, especially those on the starboard side;

whether the same were closed or open, and what was the condition of the fastenings, screws, nuts, bolts, iron covers and other parts of said ports. Was the after deadlight port starboard side of said hold open or shut, and what was it's condition?

To the fifth interrogatory he says:—I observed the deadlight ports of the No. 3 lower steerage, including those on the starboard side. They were all closed and screwed up with the dummy covers down and screwed tight. The after dead light port on the starboard side of the said hold was shut and closed in the regular way.

6. How high was the cargo stowed in the hold in question on that voyage; were the ports covered by it or not, and could or could not one pass over it reaching from the hatch to the port? How long after you last saw the hold in question did the vessel sail, and how long after you left the hold were the hatches battened down?

To the sixth interrogatory he says:—In the No. 3 lower steerage there was only one tier of cargo lying upon the deck. It would be about 1 foot 9 inches in heighth on top of the dunnage. The ports were not covered by it and would be about 3 feet above it, and anyone could pass readily over the cargo from the hatch to the port. I left the No. 3 lower steerage about 1.45 a. m., and the vessel left the dock to go into the river at 8 a. m., and she sailed the same day. As soon as we had finished the work in the No. 3 compartment we put the hatches on, but in the ordinary course they would not be battened down until the shore carpenter came down at 6 o'clock in the morning.

7. If you know any other matter or thing favorable to the Respondent, please state it without being specifically interrogated thereto.

To the seventh interrogatory he says:—It is a regular rule in the service before any cargo goes into any com-

partment, for the dead lights to be examined by the foreman in charge and to see that they are properly secured and made tight. If by any chance anything is found that wants attention, one of the officers or engineers is called down to personally see that it is properly secured. Nothing was found wrong in No. 3 lower steerage.

CROSS-INTERROGATORIES.

1. If in the answer to the fifth interrogatory, you say that you observed the after deadlight port on the starboard side of No. 3 lower steerage, and if you describe its condition, then state whether you observed all the other ports of said hold. If you answer that you did, describe the condition of each fully. State whether there was anything in the condition of the after port which caused your attention to be directed to it.

To the first cross-interrogatory he says:—I observed all the port lights in the No. 3 lower steerage. They were all closed and the dummy covers properly secured. I noticed nothing particular in the condition of the after port to cause my attention to be directed to it. I examined all the ports in the same way.

2. When was your attention first called to the condition of the after port of No. 3 lower steerage, starboard side, upon her departure from Liverpool, on May 23rd, 1895, and by whom?

To the second cross-interrogatory he says:—My attention was not drawn by anyone to the condition of the after port referred to. I examined all the ports in the No. 3 lower steerage, and this amongst the others, as part of my duty.

3. Were you in No. 3 lower steerage of the steamship "Indiana" before she sailed on the next following voyage for Liverpool? If you answer that you were, state whether the after port, starboard side, had been repaired in any way since the voyage of May 23rd, 1895.

To the third cross-interrogatory he says:—I was not in the No. 3 lower steerage of the steamship "Indiana" before she sailed on the next following voyage for Liverpool, but I was there before she sailed on the next following voyage from Liverpool.

The after port on the starboard side had not been in any way repaired since the voyage of May 22nd, 1895.

4. If you have been in No. 3 lower steerage of the steamship "Indiana" prior to her sailing on any voyage since May 23rd, 1895, state fully the condition of the after port on the starboard side prior to her departure.

To the fourth cross-interrogatory he says:—I have been in the No. 3 lower steerage of the "Indiana" prior to her sailing on every voyage since May 22nd, 1895. The after port on the starboard side has always been in good condition and properly screwed prior to departure. I never saw anything different in it. The iron dummy or cover was also closed. You could not close the iron dummy or cover without the port light was properly screwed up. The cover would not go close unless the screws had been screwed up tight.

5. If in answer to the fifth interrogatory you say that the after deadlight port on the starboard side was closed, state whether the iron port cover was also closed.

6. State fully what cargo was in No. 3 lower steerage of the "Indiana" on her voyage from Liverpool on May 23rd, 1895.

To the sixth cross-interrogatory he says:—It consisted of canvas bales, machinery, boxes of tin and 14 packages of manifest baggage.

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THOMAS KELLY of 14 Sedan Street, Toxteth Park, Liverpool, in the County of Lancaster, aged 56 years and upwards, being duly sworn and examined on the parts of the Defendants, doth depose and say as follows:

1. Do you know the Libellant and Respondent or either of them in this case? If so, how long have you known them?

To the first interrogatory he says:—I do not know the Libellants but I do know the Respondents, the International Navigation Company. I have known the responent Company for about ten years, during which time I have been in their employ.

2. What is your age, residence and present occupation?

To the second interrogatory he says:—My age is 56 years, my residence 14 Sedan Street, Toxteth Park, and my occupation that of a shipwright in the employment of the International Navigation Company at Liverpool.

3. Where were you employed on May 22nd, 1895, and did your occupation cause you to be on board the steamship "Indiana" prior to leaving Liverpool on May 22nd, 1895?

To the third interrogatory he says:—I was employed on board the "Indiana" on the 22nd May, 1895, and was on board her prior to her leaving Liverpool on that day.

4. Were you on May 22nd in any of the holds of the steamship "Indiana" especially No. 3 lower steerage; that is, the third hold from the bottom and the second below the main deck of the steamship; and if so, when were you last there prior to the sailing of the steamship on the voyage in question?

To the fourth interrogatory he says:—I was in various holds of the steamship "Indiana" but was not in the No. 3 lower steerage. I was in No. 3 upper steerage. I went on board at 6 a. m. I went to batten down the hatches. I battened them down right, fore and aft, in-

cluding that of the No. 3 lower steerage. Before battening down the No. 3 lower steerage hatch we lifted the hatch off and looked down to see what vacant space there was. This is a regular custom, so that we may inform the officers in case further room is required for putting away baggage, etc. I saw that the compartment was not full of cargo. There was only one ground tier upon the deck.

5. If you were in No. 3 lower steerage at the date in question, state whether you observed the deadlight ports of this hold, especially those on the starboard side whether the same were closed or open, and what was the condition of the fastenings, screws, nuts, bolts, iron. covers and other parts of said ports. Was the after deadlight port, starboard side, of said hold open or shut, and what was it's condition?

To the fifth interrogatory he says:—I was not in No. 3 lower steerage and did not observe or see the deadlight ports.

6. How high was the cargo stowed in the hold in question on that voyage; were the ports covered by it or not, and could or could not one pass over it reaching from the hatch to the port? How long after you last saw the hold in question did the vessel sail, and how long after you left the hold were the hatches battened down?

To the sixth interrogatory he says:—The cargo appeared to be stowed about two feet high. It would not cover the ports and anyone could pass over it readily from the hatch to the port. The vessel was in the dock at the time we battened down the hatch, but left shortly after, but I cannot say exactly the time.

7. If you know any other matter or thing favorable to the respondent, please state it without being specifically interrogated thereto.

To the seventh interrogatory he says:—I feel confident that the deadlights were closed when I looked down the hatch into the No. 3 lower steerage. It was dark there. If one of the port lights had been open I should have noticed the light from the ship's side at once. We battened the hatch down after replacing the hatch we lifted.

CROSS-INTERROGATORIES.

1. If in the answer to the fifth interrogatory, you say that you observed the after deadlight port on the starboard side of No. 3 lower steerage and if you describe its condition then state whether you observed all the other parts of said hold. If you answer that you did, describe the condition of each fully. State whether there was anything in the condttion of the after port which caused your attention to be directed to it.

To the first cross-interrogatory he says:—I did not observe the after deadlight port on the starboard side or any of the ports. It was not part of my duty.

2. When was your attention first called to the condition of the after port of No. 3 lower steerage, starboard side, upon her departure from Liverpool, on May 23rd, 1895, and by whom?

To the second cross-interrogatory he says:—My attention was never called to the condition of the after port in the No. 3 lower steerage on the starboard side.

3. Were you in No. 3 lower steerage of the steamship "Indiana" before she sailed on the next following voyage for Liverpool. If you answer that you were, state whether the after port starboard side had been repaired in any way since the voyage of May 23rd, 1895.

To the third cross-interrogatory he says:—I cannot say. If I was I could not say whether the after port on the starboard side had been repaired or not. It would not fall within my duties.

4. If you have been in No. 3 lower steerage of the steamship "Indiana" prior to her sailing on any voyage since May 23rd, 1895, state fully the condition of the after port on the starboard side prior to her departure.

To the fourth cross-interrogatory he says:—I have never examined the condition of the after port on the starboard side. It does not fall within my duty.

5. If in answer to the fifth interrogatory you say that the after deadlight port on the starboard side was closed, state whether the iron port cover was also closed.

To the fifth cross-interrogatory he says:—I am of opinion that the iron port cover was closed as well as the after deadlight port, otherwise there would have been light in the compartment from the ship's side. When I lifted the hatch and looked down I should have noticed it.

6. State fully what cargo was in No. 3 lower steerage of the "Indiana" on her voyage from Liverpool, on May 23rd, 1895.

To the sixth cross-interrogatory he says:—I do not know what the cargo of the No. 3 lower steerage consisted of.

MARCH 13, 1896.

Parties met at the office of BIDDLE & WARD, Esqs., No. 505 Chestnut Street, at 12 o'clock M.

Present:

JOHN F. LEWIS, Esq., for Libellants.
J. RODMAN PAUL, Esq., for the Steamship "Indiana."

JAMES D. FORBES, being duly sworn according to law deposes and says as follows, on examination:

BY MR. PAUL.

Q. You are the third officer of the steamship "Indiana?"

A. Yes, sir.

Q. What was your position in May last?

A. The same; third officer.

Q. Do you remember the voyage in May, 1895, from Liverpool to Philadelphia, during which some damage was done to some cargo from an open port?

A. Yes, sir,

Q. Whose duty is it to survey the holds before sailing?

A. It is my duty, sir.

Q. Did you perform that duty before leaving Liverpool?

A. Yes, sir; I did.

Q. Did you notice the ports in the various holds?

A. Each and every one of them was examined.

Q. How did you examine them?

A. By feeling the screws with my fingers and otherwise; the carpenter and I used a screw wrench on each of them.

Q. Did you examine the ports in No. 3 orlop hold?

A. Yes, sir, with the others.

Q. Did you examine the after port of that hold on the starboard side?

A. Yes, sir.

Q. What was its condition?

A. Good condition; nothing wrong with it.

Q. Was there anything broken about it?

A. Nothing broken.

Q. Anything out of the way?

A. Nothing that I could see.

Q. When did you see that port—how long before sailing did you see it last?

A. I could see the port up to within an hour or two of finishing loading.

Q. Did you see it, I say?

A. Yes, sir; I did see it.

Q. So you saw it last up to within an hour or two of finishing loading?

A. Yes, sir.

Q. Did you examine it?

A. No, I made no examinations; just looked at it.

Q. When had you made the examination?

A. The forepart of the day.

Q. When did you sail—do you remember?

A. About five o'clock in the morning.

Q. What day was it that you sailed—do you remember the day of the month?

A. No; I cannot remember.

Q. About how many days afterwards was it, as far as you can remember, before you heard anything of this port?

A. I should say six days.

Q. What did you hear then—do you know personally anything about the matter or only what you heard?

A. Only what I heard; the captain was the first to notify me; I was on the bridge then, and the captain notified me of the fact; he almost blamed me for having this thing happen.

Q. What did he tell you?

A. He told me that there was one of those ports open in No. 3 hold orlop deck; I told him that was impossible, for I had examined them thoroughly before leaving; that was the information I had of this.

Q. Did you see the port then?

A. No; I never went down, because my duties kept me on the bridge.

Q. Did you see the port after you got to Philadelphia?

A. Oh, yes; I went down then, when they took the cargo out I went down to have a look.

Q. What was the condition of the port screws?

A. Seemed to be all right.

Q. Do you know whether anything has been done to that port since?

A. No, sir; I have not heard of anything being done to it.

Q. Do you know whether it is in the same condition?

A. The same condition as it was then.

Q. Which is No. 3 hold orlop deck? Describe it so that we know exactly what it is?

A. There is the upper deck, under that is the steerage where passengers live, and under that is the orlop deck.

Q. What is below that?

A. Between decks and lower hold.

Q. So that it is the third story as it were above the bottom of the ship?

A. Yes.

Q. And No. 3 means what?

A. The third hold of the ship from the bow.

Q. Is that forward of the engine room?

A. Forward of the engine room.

Q. How high above the floor or ceiling of the hold are these ports?

A. From the deck to the lower port is seven feet ten inches.

Q. Then you went from the upper edge of the port ceiling to the next deck?

A. I should think about two feet. Two feet three or four inches.

Q. What is the diameter of the port itself?

A. The diameter of the port is nine inches.

Q. How is the port closed—what has it in the way of covers for closing?

A. It has a glass window, also what we call a dummy, a dummy blind goes over the glass.

Q. What is that?

A. It is an iron plate shutting down on top of the glass after the glass is secured in.

Q. The glass is set, of course, in some metal?

A. A brass circle, and that goes on a hinge and opens forward from the side.

Q. And how about the iron clip you spoke of?

A. That hinges above the port and raises up,

Q. When you saw the port in Liverpool was the glass and cover both on or only one?

A. Both on and both secured.

Q. Is Captain Townsend living?

A. He is dead.

Q. What sort of weather did you have during the five or six days out before the Captain told you this?

A. We had different weather.

Q. What is the distance above the water line upon an even keel of the "Indiana" loaded of these ports in the orlop deck No. 3.

A. Well, they are not loaded the same every trip.

Q. Can you give us any idea?

A. On this particular voyage I should think that port must have been from two to four feet above the water.

Q. What would be the effect of the rolling of the ship if that port was open as to water coming in or not?

A. The water would certainly come in if the port was open.

Q. Would it require a very great rolling in rough weather?

A. I should think not.

Counsel for Libellants reserves the right to cross-examine the witness when he returns upon his next voyage and calls for the log book of the Indiana.

APRIL 17, 1896.

Parties met at the office of BIDDLE & WARD, Esqs., No. 505 Chestnut Street, Philadelphia, at 10.30 o'clock P.M.

Present:

H. L. CHEYNEY, Esq., for Libellant.
J. RODMAN PAUL, Esq., for Steamship "Indiana."

JAMES D. FORBES recalled.

BY MR. PAUL.

Q. When you were last examined the hold in which this port hole was, which was stated to be the third from the bottom of the ship was called the orlop deck either by me or by you; is that the usual or universal name for that?

A. As I have been used to calling it.

Q. Is it called by any different names by others?

A. Yes, sir; there is between decks and the orlop deck, and others again the between deck.

Q. To fix the position of that deck you stated too it was the third one from the bottom. Enumerate the decks on the "Indiana?"

A. From the outside deck, that is in the open air, that is the main deck; under that is the steerage where passengers live; under that is what I have been calling between decks, that is where this thing happened; under that is the between decks and the lower hold.

Q. How many altogether?

A. There is the lower hold, and the between decks and orlop, as I call it.

Q. And what is above the orlop?

A. There is the steerage and the main deck.

Q. Do you know whether it is called ever the lower steerage?

A. I never heard any one to call it so, because we had no passengers there; consequently we never had any occasion to call it the lower steerage. It has always been filled with cargo during the time I have been on the ship. If there had been passengers there I should naturally have thought it was the lower steerage.

Q. When you last saw the hold before leaving Liverpool was the cargo below the level of this port or above it?

A. As near as I could judge, because I did not take a great deal of notice how high it was, it was not above the lower part of the port; it may have been a few inches in, but the port was perfectly clear above the surface of the cargo.

BY MR. CHEYNEY.

Q. I understand this deck you call the orlop deck is the first one underneath the steerage?

A. Yes, sir; the first one underneath the steerage.

Q. And it is on the "Indiana" used for carrying cargo entirely?

A. Yes, sir.

Q. How was the "Indiana" coming over that time; was she loaded?

A. No, she was not filled up; she had all she had to put into her.

Q. About what is the heighth of the orlop deck, the space between the orlop deck and the steerage?

A. Between the floor and the ceiling.

Q. Yes, sir?

A. About eight feet.

Q. How far above the flooring was this port hole?

A. From the floor to the lower part of the port, five or six ~~inches~~ feet.

Q. And how wide is the port?

A. Nine inches diameter.

Q. I understand you did not see the port at all from the time you left Liverpool until the time you arrived at Philadelphia?

A. No, sir.

Adjourned.

DECEMBER 17TH, 1896.

Testimony taken on behalf of Respondent at the office of Biddle & Ward, 505 Chestnut Street, Philadelphia, at 3.30.

Present:

H. L. CHEYNEY, Esq., for Libellant.
J. RODMAN PAUL, Esq., for Respondent.

HENRY L. EBSEN, sworn and examined:

BY MR. PAUL.

Q. What is your position, Mr. Ebsen?

A. Draughtsman of the International Navigation Company.

Q. Please state whether you made any measurements with reference to the deadlight ports or any of them of the steamship "Indiana" recently?

A. Yes. When the ship was here last I made a measurement.

Q. And the port light in the lower steerage No. 3 compartment measured what distance above the water line?

(Objected to by Mr. Cheyney as irrelevant and immaterial.)

Q. Which particular deadlight port were you measuring?

A. The one that I measured was the port on the starboard side in the lower steerage of No. 3 compartment.

Q. How many ports are there in that?

A. I did not count them. I took the after one.

Q. Had you been provided with any data from which to make your measurements, as to draft, etc.?

A. None whatsoever, I took all the data myself.

Q. Well, what did you do?

A. I found out at what draft this port in question would come level with the water. That is, I figured it to be 24 feet 8¼ inches, the draft, and I arrived at that conclusion by noting the draft that the ship had at the time I measured her, and making the necessary corrections for list and trim ship, &c.

Q. Now, assuming that that vessel had a draft of 20 feet and 3 inches forward and 22 feet 3 inches aft, in leaving Liverpool, and that on her arrival at Philadelphia she had a draft of 20 feet 3 inches forward and 20 feet no inches aft, and taking about the mean between those drafts on leaving and on arrival, what did you calculate would be the height of the port hole above the load water line?

(Question objected to, as there is no evidence in this case as to the correctness of the figures that were mentioned in the question.)

A. The draft at the port light on that day in question would be 20 feet 7¾ inches, and the bottom edge of the port light 48½ inches from the water's level or 4 feet and a ½.

Q. What is the circumference of the port? Did you measure it?

A. No, I did not measure that port in particular, but they are all about the same in that ship, they are the usual standard nine inch, what we call the 9 inch port light, so my record might probably be 9¼ or 9⅜.

Q. Now, can you tell us, taking the distance above the water line that you have given of 48½ inches, how many degrees the ship would have to roll to submerge that port?

A. To entirely submerge the port, it would be about 12⅞°, I figure it to be.

Q. And to submerge the light then it—

A. Would be about 10⅜° as I have figured it.

Q. Did you make a drawing showing that distance?

A. Yes, I made a diagram in the letter itself.

Q. Is that it? (Showing witness paper.)

A. Yes.

Cross-examination.

BY MR. CHEYNEY:

Q. When you stated that the port was as I think about 4 feet, would have been about 4 feet from the water, I suppose you refer to water which would be perfectly smooth?

A. Perfectly smooth, exactly. Of course, when I took the measurement there was a little wash, too.

Q. You took the measurements in the Delaware River, however?

A. Yes.

Q. While the ship was lying at the wharf?

A. Yes, at the wharf; the water was pretty quiet.

Re-examined.

BY MR. PAUL:

Q. I see the diagram is signed "James Carnegie, Assistant Superintending Engineer;" did he make it, however, or yourself?

A. No, those calculations were made by me.

Q. And who drew that?

A. I drew that myself; I simply had him sign it as he is my superior officer.

Re-cross-examined.

BY MR. CHEYNEY.

Q. You know nothing yourself of the correctness of the figures as to draft, upon which this calculation is based?

A. No, those were given me; that is the original figures of how the ship stood at the time of leaving and arriving at Liverpool; those were given me.

Signature waived.

CAPTAIN J. W. SHACKFORD, sworn and examined.

BY MR. PAUL.

Q. Captain, you are the Marine Superintendent for the International Navigation Co.?

A. I am.

Q. And have been for how many years?

A. Since 1889.

Q. Prior to that time what were you engaged in?

A. Ship Master.

Q. And what steamers and vessels had you been in command of?

A. I was nine years in command of the S. S. "Illinois," five years and a half in command of the steam yacht "Atalanta," and about a year in command of sailing ships, three years as chief officer of the White Star steamers running between New York and Liverpool, and a number of years as an officer on sailing ships. I was five years in command of small steamers besides that.

Q. The "Indiana" and "Illinois" are twin ships, are they not?

A. Twin ships, built in the same moulds.

Q. Please state, in a general way, the dimensions, age and general character of the S. S. "Indiana?"

A. As I remember she is about 350 feet long by 43 feet beam, 38 feet moulded depths.

Q. About how many tons?

MR. CHEYNEY.

Q. What do you mean by "moulded depths?"

A. It is measured from the top of the ceiling to the under side of the upper deck—from the top of the ceiling of the lower hold to the under side of the upper deck.

MR. PAUL.

Q. When was she built and by whom?

A. She was built in '73, I think, either '72 or '73, by Cramp & Sons.

Q. Has she been constantly in commission ever since?

A. She may have been laid up for a few months, perhaps, for alterations; with the exception of that she was in constant employment.

Q. What is her general condition as to navigability at this time, and what was it in May, 1895?

A. She was in excellent condition, in my judgment.

Q. Is it part of your duty to inspect the vessels of the Company?

A. It is; everything appertaining to the deck department.

Q. And in May and the early part of June, 1895, what was her general condition as to seaworthiness?

A. Excellent.

Q. How many tons—I don't think you mentioned that?

A. Between 31 and 3200 tons, I think, as they are now, under the new tonnage law; under the old one a little less; before they were altered they were a little less.

Q. What are your duties with reference to the appointment and selection of officers and crew for the steamships?

A. I appoint all the officers in the deck department, from the captain to the junior officer.

Q. In whose department is the closing and attention to the ports—the deadlight ports of the steamer?

A. The deck department.

Q. Now, in 1895, the latter part of May, and beginning of June, who were the officers in the deck department?

A. I will look at a memorandum; can I? Captain Townsend—

Q. Without going into the list. What has happened to Captain Townsend?

A. Captain Townsend is now deceased; he joined the company in 1881 and was third officer; he was made chief officer in 1887, shortly before I became connected with the Line as Marine Superintendent, and he remained as chief officer until May, 1894, with the exception of perhaps half a dozen voyages; he had command when captains were sick or taken off for some reason, and, in 1894, he was put in command permanently, and remained in command until he died.

Q. What sort of an officer was he from your experience?

(Question objected to as immaterial.)

A. He was a very good officer, indeed, and as far as I know was an excellent commander.

Q. Now, without going into detail, as to each man, it takes up too much time, it is not necessary; the various officers under him, what pains had you taken in their appointment, and what were they in your opinion?

(Question objected to as being immaterial and irrelevant.)

A. Mr. Chapman, the chief officer, was a very good man for that class of vessel; he was a competent officer,

he had had thirty years' experience at sea, had been master of several sailing ships, and I consider that he was—

Q. Is he any longer with the ship?

A. Not with the company any more.

Q. Now Dixon?

A. Dixon, he was a good officer, still in the employ of the company; he has been on one of the Southampton steamers as second officer.

Q. Forbes?

A. He is still third officer of the "Indiana," still in the same vessel.

Q. Do you consider him a good man?

A. A very good man, indeed.

Q. The carpenter, Miller?

A. The carpenter had been many years in the service of the company. I don't remember how many, certainly ten or fifteen, and had always performed his duties in a satisfactory manner.

(General objection to all of this.)

Q. Please describe the various decks and compartments of the "Indiana?"

A. No. 3 hold particular.

Q. With reference to No. 3 lower steerage particularly?

A. There are four decks to that ship, that is, what they call the spar deck (upper deck) and upper steerage deck and lower steerage deck and orlop deck. The lower steerage is the second compartment below the upper deck, the first compartment below is called the upper steerage, the second compartment the lower steerage. And the compartment below is the orlop; below that again, the lower hold.

Q. And when you speak of No. 3?

A. That is the third compartment from forward aft, what is called the collision compartments.

Q. Is that lower steerage used for cargo or passengers, or both?

A. It is used for either.

Q. What is the means of access from the upper deck to the upper steerage?

A. By stairways and the hatch.

Q. And from the upper steerage to the lower steerage?

A. By stairways for the passengers and by taking off the hatch and putting an iron ladder alongside the hatch stanchions when there are no passengers.

Q. From your experience at sea, and especially as captain of the "Illinois," a mate ship, can you tell us what amount of weather or of roll would be required to roll a ship more than twelve degrees?

A. A very moderate roll would roll one of those ships twelve degrees, a very moderate sea, rather—either on the side or from the quarter.

Q. Would there be any difference as to the water coming through an open port upon the weather and leeside of the ship?

A. Well, if there was any sea and the ship was not rolling and the lee port was not under water, of course, it would be more likely to come in to leeward.

Q. Otherwise it would not make much difference?

A. Otherwise it would not make much difference; it would roll a little more perhaps to leeward than to windward in ordinary weather.

Cross-examination.

BY MR. CHEYNEY.

Q. Captain, do I understand that the hold referred to is sometimes used for passengers?

A. Yes, sir.

Q. For what purpose; were there berths in that hold?

A. Not permanent berths; portable berths.

Q. Berths had at times been placed in that hold?

A. Yes, we carry passengers there frequently.

Q. What was there just above this hold?

A. Just above this hold was the upper steerage, the cabin deck or the upper steerage deck.

Q. What means of communication were there with this hold with the exception of the hatches?

A. No communication whatever.

Q. Were the stairways put down through the hatches at the time they were used for steerage passengers?

A. When it was used for steerage passengers there were temporary stairways put in the hatch from each side, from each side of the hatch, from the upper steerage.

Re-examined.

BY MR. PAUL.

Q. Is the first engineer who was there with the "Indiana" in '95 still there?

A. He is not in the service of the Company any more.

Re-cross-examined.

BY MR. CHEYNEY.

Q. How long has Captain Townsend been dead?

A. I think he died last year; I think last fall, if I remember. Some time last year, I don't remember exactly when it was.

Signature waived.

HENRY TAGGART, sworn and examined.

BY MR. PAUL.

Q. What is your business?

A. Assistant Superintendent American Line.

Q. How long have you been with them?

A. Between twenty-two and twenty-three years.

Q. And what is your particular business with reference to the ships of that line?

A. I have charge of the discharge and loading of the ships.

Q. Do you remember superintending the unloading of the "Indiana" in the early part of June, 1895?

A. Yes, sir.

Q. When did you go there and what did you find?

A. My business when a ship arrives is to go on board and see that everything is all right, before she starts to unload.

Q. What time of day did you go there on this occasion; do you remember?

A. I forget now.

Q. Were the hatches off when you went there?

A. No, sir, I went aboard with the men.

Q. Did you see the hatch of No. 3 lower steerage taken off?

A. I seen them taking it off, yes, sir.

Q. Did you see the interior of that compartment?

A. Down below?

Q. Yes?

A. Yes, sir.

Q. Did you see it at once before the cargo had been taken out?

A. Yes, sir.

Q. What did you see?

A. I was going along the deck from one hatch to another; they sang out, "Stuff all wet down here," and I jumped right down; there it was wet.

Q. How was the cargo stowed in that compartment? What was in it, what sort of cargo was in it, and how was it stowed?

A. There was some tin in it, four or five cases of machinery, and bales of burlaps.

Q. How was it stowed? How high?

A. Stowed in one tier, right across the ship, all over.

Q. How high up did the cargo come, in a general way—some might have been higher and some lower?

A. That high (indicating two feet and a half or three feet high).

Q. Did you see the port dead lights in that compartment?

A. I saw them; yes, sir.

Q. Were they above or below the line of the cargo?

A. Above, up near the beams.

Q. Was it possible to pass from the hatch to them across the cargo—walk across?

A. I walked across the cargo, on the top of the cargo, fore and aft, this way (illustrating, bending slightly).

Q. Did you notice these port holes when you were there?

A. I seen nothing the matter with the port holes.

Q. Were they closed or open?

A. All closed.

Q. How long would it take you to take off the tarpaulin and hatch of that No. 3 steerage compartment?

A. With the men going to work?

Q. Either the men going to work, or if you went there yourself hurriedly to take it off so as to—

A. The men would go down there and take off the hatches in less than five minutes, all off.

Q. How long would it take to take a section out, for one man to go down into it?

A. About three or four minutes; I could take one off myself.

Q. In how long a time?

A. Just throw the tarpaulin up and grab the ring, and throw the hatch aside; the hatch is in two parts, you know, fore and aft, piece between, and the hatch is set right on, four on each side, ring in each one, both sides of the hatches.

Q. And, in order to get down, you have to tear up the tarpaulin, and take hold of the ring in the hatch and throw it to one side?

A. If there was more than one man there, it would be easier for them to do it than it would be for one man to do it, but I could do it myself alone.

Q. How long would it take two men, we will say, to take up the tarpaulin and take out one section of the hatch, through which to get down?

A. They would not do it much quicker than one.

Q. Well, how long?

A. About two or three minutes.

Q. Are they very heavy, these sections? Can one man lift them out?

A. No, sir, they are not heavy.

Q. Can one man lift them?

A. I can lift them myself.

Q. Did you take any measurements, Mr. Taggart, of this No. 3 compartment, with reference to those port holes?

A. Yes, I think I took a measurement there.

Q. Do you remember the height of that compartment?

A. That deck is about seven feet and a half.

Q. And how high above the lower deck is the port hole, the lower edge of the port?

A. About five feet, somewheres around there.

Q. And how wide is the port itself in diameter?

A. About ten inches, something like that (indicating.)

Q. Did you measure the size of these burlap bales that were stowed there?

A. Yes, sir.

Q. How large are they?

A. About three feet on the edge, about two or two and a half I think on the flat, about eight feet long.

Q. You say there was one tier of this?

A. Some were on the flat and some were on the edge, to make it chock, and so that they would not get adrift.

Cross-examined.

BY MR. CHEYNEY.

Q. Do you remember who called your attention to the fact that there was water in this hold?

A. The men, just as they jumped down the hatch, they hollered everything was wet down here.

Q. Was that before any cargo was taken out?

A. Before any cargo was touched.

Q. You went down immediately?

A. I went right away.

Q. Was there water in the hold at that time?

A. In the deck?

Q. On the deck?

A. No, sir.

Q. Had any water leaked out into any of the other holds?

A. It might have run down the hatches, down below.

Q. Do you know as a fact whether any other cargo was damaged except in this hold, in this one hold?

A. I don't know now whether there was or not.

Q. The cargo which was in that No. 3 hold was pretty badly damaged, was it not?

A. All in the hatch was wet, all the way down. I don't think anything in the other deck was wet, clear of the hatch.

Q. Do I understand there was some cargo wet in the lower deck beneath the hatch?

A. All the way under the hatch, as it went down, went down through that hatch.

MR. PAUL.

Q. But not away from that hatch?

A. Not on the deck at all.

MR. CHEYNEY.

Q. How is the hatch in the deck in that hold, flush with the deck or with combings in that No. 3?

A. There is not much of a combing around it at all, around the lower deck where the water was.

Q. It could leak right down through the hatch?

A. Yes.

Q. The cargo which was in this hold was pretty badly damaged, was it not?

A. On the deck you mean?

Q. On the deck?

A. Yes.

Q. Do you know how high the burlaps were wet, were they wet all over?

A. Wet all over, and swollen out, and a number of hoops were bursted.

Q. Was there anything on the sides of the hold to indicate how deep the water had been, was there any mark left there?

A. No, sir.

Q. Where was the cargo which was damaged in this hold? Was it that which was immediately beneath, joining the port or all over it?

A. All over.

Q. There evidently then had been enough water come in to cover the deck completely? In other words, the damage had not been done simply by the water spraying in the port, but enough water had come in to cover the deck entirely?

A. One end of it was as wet as the other, where the port was, at the end where the port was, it got wetter on the top.

Q. Where was the port, in what end of the hold?

A. Right by the bulkhead.

Q. What I mean was, that the cargo which was damaged was not that which was near the bulkhead, near the port hole, but all the cargo which was lying on the deck was damaged?

A. Some was worse than the other.

Q. But all of it was more or less wet?

A. Yes.

Q. And the burlaps had swollen and bursted some of the hoops?

A. Yes, sir.

Q. I wish you would describe what coverings there are for the port in that hold, what covers are there: there is a glass cover?

A. There is an iron cover on the inside. I don't think there is any glass in it.

Q. Is there but one covering for that port hole?

A. It all lifts, it all opens together.

Q. Let me understand, as Captain Shackford suggests, there is a glass port; does that open or not, can you open that?

A. Glass port?

Q. Yes?

A. I don't know whether you can or not.

Q. What was the condition at that time?

A. All closed.

Q. Could they be opened or were they fixed there?

A. Oh, yes, they could be opened.

Q. How, by unscrewing them?

A. They were the ordinary ports which were fitted on, and could be unscrewed on one side.

Q. In addition to that there was an iron port cover?

A. Yes, sir.

Q. That was fitted on the inside?

A. Inside.

Q. And that, of course, could also be opened? Is that fitted in the same way as the glass port, or not?

A. I could not tell you that.

Q. You don't know particularly how it is fitted?

A. No, sir.

Q. When you saw the port was closed at that time, do you mean—

A. Everything was closed, I did not see anything about it being opened.

Q. The men had not opened it for the purpose of allowing light to go in?

A. It was daylight, and they just jumped down there.

Q. It had not been opened? It is customary, though, for the stevedores to open the iron port covers, is it not?

A. When they are discharging. When they are loading they close them up, the stevedores see that they are closed.

Q. Did you make any examination to ascertain where this water had come from, how it had gotten into the hold?

A. No, sir.

Q. You did not investigate that at all?

A. No.

Q. Did you see anything to show how it had gotten into the hold?

A. No.

Q. You don't know whether it came in through this port or not?

A. No.

Q. Were you walking around there at various times? You were in the hold at various times?

A. All the time.

Q. Do you mean to tell me you had never looked to see?

A. The surveyors have that charge of it.

Q. No matter what the surveyors had. What did you do? Did you not look around yourself to see where the water had come from?

A. I knew there had been water there, but there was none there then.

Q. Did you not look around to see how it had gotten in?

A. Yes.

Q. What did you see, if anything; if so, how had it gotten in, could you tell whether it came in through the port, or whether it came in through the hatch, or where?

A. No, I could not tell that, there was nothing to show me that.

Q. Now, do I understand, Mr. Taggart, there was nothing that you saw or that you looked around and could see nothing to show, to indicate, how the water had got in, do you understand? Which do I understand to be your meaning? That you looked and could not see how the water got in, or that you did not look?

A. I looked around to see if there was a leak or anything, but I did not see anything to show anything.

Q. That cargo was discharged under your supervision?

A. Yes, sir.

Q. And the surveyors, as you say, made an examination; was that in your presence, or not; were you there, in the hold, when they were there?

A. No, sir.

Q. You don't know what they did then?

A. No.

Q. Was the cargo loaded in the hold on the outward voyage?

A. Yes.

Q. Do you know whether or not any changes or repairs were made in any way, either to that port, or anything in connection with that hold, before the cargo was loaded?

A. Nothing that I know of, I did not see anything.

Q. Did you look to see whether anything had been done or not?

A. If they had been doing anything I would have seen them do it.

Q. Are you prepared to say that that port or port cover were not repaired while the vessel was in Philadelphia?

A. I am not prepared to say; I did not see anything at all; I was there all the time. I did not see anybody repairing anything.

Q. You are not in that hold all the time, you are all over the vessel?

A. No, sir, all over.

Q. When was your attention first called to the fact for the purpose of testifying here, recently or some time ago?

A. What do you mean, testifying in this case?

Q. When was your attention first called to the matter?

A. I don't know how long it has been, it was not just now.

Q. Some little time, some months ago?

A. Yes.

Signature waived.

NOVEMBER 8TH, 1897.

Testimony taken on behalf of Respondent at the office of Biddle & Ward, 505 Chestnut Street, Philadelphia, at 2 P. M.

Present:

H. L. CHEYNEY, Esq., for Libellant.
J. RODMAN PAUL, Esq., for Respondent.

MARK K. BOWMAN, sworn and examined:

BY MR. PAUL.

Q. What is your business and residence?

A. I am Treasurer of the James Reilly Repair and Supply Co. And do you mean my New York residence?

Q. Your office in New York?

A. 230 West street.

Q. What is the business of the Reilly Company?

A. Steamship repair work and supplies.

Q. What has that company to do with the American Line here and in New York in reference to repairs?

A. They do all of the repair work on the ships of every character.

Q. Is there anything done by any other shops except the Reilly shops for these steamers?

(Question objected to.)

MR. CHEYNEY.

I don't suppose the witness is exactly competent to answer.

MR. PAUL.

Q. On this side I mean?

MR. CHEYNEY.

I suppose he has a contract.

MR. PAUL.

Q. Have you an exclusive contract, on this side I mean?

A. Yes, it is understood generally that the Reilly Company is to do all the work that develops on the ships.

Q. What is the method by which the repairs are done after any voyage, and how do you know, how are you notified as to repairs needed?

A. We generally get a requisition.

Q. And they then perform the work that is required in the requisition?

A. Yes.

Q. Is there something to be done after every voyage, as a rule?

A. Yes, always.

Q. Was this the practice as well in '95 as it is now?

A. Yes, it always has been to my recollection.

Q. How long have you been doing the work?

A. The Reilly Co. was organized in 1892, they have done it since then; and before that Mr. Reilly did it a good bit previous to that time, over twenty years, to my knowledge.

Q. Will you please look at this document in the letter book dated June 6th, 1895, and state what that is?

A. That appears to be a copy of a requisition for work in the sailing department of the "Indiana."

Q. What voyage would that apply to?

A. Apparently for the voyage '82 as indicated on the face of the requisition.

Q. Where was the "Indiana" at that time? Where was that order received from?

A. It was supposed to be in Philadelphia, and supposed to be received from the Marine Superintendent's office in Philadelphia.

Q. Can you tell from the books of your company?

A. Yes.

(The press copy is offered in evidence.)

Q. Is there any new material required there for the dead lights or ports of the vessel in that requisition?

A. I don't see anything in that requisition.

Q. Would it have been if new material or a new cover, for example, for any of the ports had been required; would that have appeared in that requisition?

A. Very likely, because that would be an important part of the dead light, and would have been ordered to be done.

(Question objected to as not being within the knowledge of the witness.)

Q. Have you the bills which were rendered in consequence of that requisition for repairs after the voyage Nov., '82?

A. I have the bills, here they are.

Q. Does that show everything that was done by your company on that occasion?

A. Yes, sir.

Q. Is that an unusual bill in size or amount?

A. No. sir.

Q. How much was done for deck purposes as included in that bill?

A. All the deck work.

Q. Yes, all the deck work? I understand deck work to cover the question of overhauling ports, etc.?

A. Repairs to the hull and the deck, and deck furniture and fixtures, and everything of that kind, about eighty dollars worth of work.

Q. Is that a large or small sum for any voyage?

A. I should say that was a small sum.

Q. Is there any reference to ports in that bill?

A. Yes.

Q. What is that?

A. There is a charge here for steerage air ports on this bill.

Q. How much?

A. $3.21.

Q. Does it appear what that is for?

A. It appears to be a general overhauling of the steerage ports.

Q. Any particular ports?

A. No.

Q. How many steerage ports are there?

A. I don't know exactly, I should judge at least twenty-five—fifty perhaps.

Q. How often were those ports overhauled?

A. They are overhauled more or less—well I don't know what you mean exactly by "overhauled."

Q. I mean by "overhauled" new rubber, for instance, put in, but no new structure in the way of material, metal work or glass?

A. We always examine every ship to see that they are all right, that the rubber is in good condition, and they are all right.

MR. CHEYNEY.

Q. Do you know that of your own personal knowledge?

A. I know that from an experience of thirty years, that that is the custom to do that.

MR. PAUL:

Q. Is there anything on that bill showing a new cover or other new material in the way of glass or metal for any port on the vessel after that voyage?

A. No.

Q. Would it have appeared in that bill if it had been furnished by you?

A. Yes.

Q. Was there anyone else who furnished it, to your knowledge?

A. No, sir.

(Bills marked "B. I. M., November 8th, '97," offered in evidence.)

Cross-examined.

BY MR. CHEYNEY:

Q. Mr. Bowman, all that you know in regard to this matter is that your Company made certain repairs to the "Indiana" at the end of that voyage, isn't it?

A. Yes.

Q. You cannot tell positively whether the ports were examined by the officers of the Company or any of the crew every voyage or not, can you?

A. I can tell by the charges, yes.

Q. How can you tell by the charges?

A. Because there is nothing that the men do unless there is a charge made.

Q. Where is your office, your place of business, in New York?

A. Yes.

Q. You are a resident of New York?

A. Yes.

Q. How do you know, as a matter of fact, what is done by the officers or crew of the steamship "Indiana" when you are in New York? You have no connection with the Company except to make repairs upon requisition, isn't that so?

A. I based my reply entirely on the method of doing business; when anything is done there is always a charge made to cover that work, whatever it may be, it may be ever so trifling, if it only amounts to a penny it is charged, and I based my reply on that fact, that that is the custom of the business; if anything was done, no matter how little it might be, there would be some sort of a charge made to cover it.

Q. If anything is done by you?

A. By the Reilly Company's men.

Q. But you are not speaking and can't speak of what is done by the officers and crew of the steamship "Indiana" or by any other person, can you?

A. Well, I don't quite see what you want me to say there, what you mean.

Q. I want you to say yes or no.

A. I know, but I don't see the point; I would like to qualify that answer. Having in mind the subject that we are talking about, I know that no member of the crew would do anything of that kind; if there was anything of that kind to be done, it would naturally be done by the Reilly Company that was there for that purpose, organized for that purpose.

Q. Let me call your attention to what you are here for; you are here to testify to facts which are within your knowledge?

A. Exactly.

Q. Not to what probably is done in the ordinary course of business; you don't know, as a matter of fact, whether or not the ports of the "Indiana" are examined by

the officers or crew at the end of every voyage, or any other person in the employ of the International Navigation Co.?

A. Whether they are examined?

Q. Examined to see whether they need any repairs?

A. I don't think I am a competent witness for that evidence; you ought to ask the officers of the International Navigation Co. about that.

Q. Your answer rather indicated that you meant to testify that they were examined. All that you did and all that you know is, that your Company makes repairs and furnishes supplies upon a requisition by the officers of the International Co.?

A. Yes.

Q. And you speak of the repairs which are done by your Company?

A. Exactly.

Q. Your Company of course makes no examination or does nothing except to receive a requisition, usually from Captain Shackford, I suppose?

A. Or from some other officer in charge, issuing orders.

Q. Captain Shackford has charge of the deck department, and this requisition I think is in the sailing department, is it?

A. Yes.

Q. Of course, the bill which has been—the charge in the bill which has been shown here for general overhauling of the steerage ports does not show what repairs were done to any particular port, you cannot tell from that what was done?

A. That bill would indicate, the records would indicate that there was more or less done to a number of ports, as the charge is in the plural there, you will see, "air ports."

Q. You personally don't know what ports received attention?

A. No.

Q. Has your company a place of business in Philadelphia?

A. Yes.

Q. And these requisitions are sent from Philadelphia for the vessels of the American Line sailing here to your office in New York first, are they?

A. No.

Q. Where?

A. They are sent to our Philadelphia office.

MR. PAUL.

Q. Where do you keep the records eventually? where are the things kept?

A. The records, in New York.

MR. CHEYNEY.

Q. You are in New York yourself?

A. Yes.

Q. Who manages the Philadelphia end of it?

A. I do.

Q. Are you here?

A. I am here once a week.

Q. What day are you here?

A. No particular day.

Q. Have you any personal knowledge of any of the repairs which were made to the steamship "Indiana" upon this particular voyage?

A. Only from the records.

Q. And you only pretend to testify, refreshing—or getting your information from the records?

A. I certify to the correctness of the records.

Q. You have a foreman in charge of your shop here, I suppose, have you not?

A. Yes.

Q. And the records are made up from information given by him?

A. No, the records, charges, are not made up that way.

Q. What is your method; tell me briefly what your method is for making up charges for work done in Philadelphia?

A. The man who has charge of the department keeps the time of the men under him in his department; he has a book with the names of the men under him, and he notes down there periodically during the day what each man has been doing.

Q. In short, he keeps a time book?

A. Yes.

MR. PAUL.

Q. How about the material?

A. The material part is kept by the storekeeper, who makes a charge in the material book.

BY MR. CHEYNEY.

Q. Those time books and the material books are sent to you in New York and the bills are made up in that way?

A. Yes.

Q. Mr. Bowman, do you personally remember anything about the repairs upon this particular voyage or not?

A. No.

Re-examined.

BY MR. PAUL.

Q. Mr. Cheyney asked you whether you could say from that charge, time in overhauling ports, what was done to any particular port; can you say what sort of work was put on those ports, as to whether it was material or whether merely it was all labor?

A. There is also a little charge for rubber which I consider so trifling that it is hardly necessary to allude to, it is for renewing a rubber cushion in the port light, for making it tight.

Re-cross-examined.

BY MR. CHEYNEY.

Q. The charge in this bill is for ¼ pound of pure rubber; do you know, Mr. Bowman, how many ports that would be sufficient for? Are you familiar enough with the details of the business to say?

A. Yes, it would depend somewhat on the size of the rubber; it might be enough for two or three ports, it might be enough for one; it all depends on how much they had to do; the rubber is light, and a little piece of it would go a great way.

Q. Have you any idea what weight of rubber would be required to renew entirely each port?

A. As I said, it would depend on the size of the rubber. They vary in size very much; they vary all the way from a quarter of an inch in width to half an inch.

Q. And you don't know, of course, what they were on the "Indiana?"

A. No.

DECEMBER 28TH, 1897.

Testimony taken on behalf of Respondent at the office of Biddle & Ward, 505 Chestnut Street, Philadelphia, at 2 P. M.

Present:

H. L. CHEYNEY, Esq., for Libellant.
J. RODMAN PAUL, Esq., for Respondent.

HIRAM DICKSON, sworn and examined:

BY MR. PAUL:

Q. What is your occupation now?

A. Second officer.

Q. Of what?

A. S. S. "St. Paul."

Q. And in May, 1895, what was your position?

A. Second officer.

Q. Of what?

A. S. S. "Indiana."

Q. Do you remember the voyage from Liverpool to Philadelphia in May, 1895, during which the cargo was wet by the open port or dead light?

A. I do.

Q. What is your duty on shore with reference to the inspection of ports and dead lights?

A. My duty is to see that they are closed and secured before cargo is taken in the ship.

Q. Is that your duty as second officer?

A. It was on that ship—yes, sir.

Q. In Liverpool, before starting on this voyage, did or did not you perform that duty?

A. I did.

Q. What did you see and do with reference to the ports and dead lights upon the "Indiana" before that voyage?

A. I saw that they were all secured, and all bolted and everything, that is, with the carpenter.

Q. You mean you went with the carpenter?

A. After he had performed his duties I went around to see if they were properly secured.

Q. What did you find as to the ports and dead lights on that occasion?

A. They were all O. K., all, all right.

Q. Were there any of them damaged or injured in any respect?

A. None at all whatever.

Q. At the time you saw them were they secured?

A. They were secured thirty hours before leaving.

Q. That was the time you saw them?

A. That was the last time I saw them.

Q. How about the dead light of No. 3 lower steerage on the starboard side?

A. That was closed and secured.

Q. Was that towards the wharf, or towards the open—

A. Towards the wharf.

Q. At Liverpool?

A. At Liverpool.

Q. Now, during the first few days after you sailed from Liverpool, what sort of weather did you have? I will hand you the log of the "Indiana" for that voyage so that you can refresh your memory with it.

A. Do you want these read?

Q. No, just glance over it, if you don't remember, and tell us in a general way during the first few days of the voyage what the character of the weather was?

A. We had fresh breeze to moderate breeze, cloudy, hazy and rainy, moderate sea, rolling heavily at times, heavy swell, choppy head sea.

Q. Well just glance over them (I offer them) and state whether the weather was clear during all the time prior to the discovery of the open port hole or what it was?

A. Strong breeze at the time, rough sea, and squally at that time, at the time of the discovery, and before that, before that we had fresh breeze, partly overcast, passing rain squalls, fresh breeze, heavy swell on; that is about all.

Q. About how high above the surface of the water, when smooth, would be this port or dead light of No. 3 lower steerage, when loaded?

A. At the time, I should judge about between two and three feet.

Q. In weather such as you have read, if that port had been open, would water have come in?

A. Yes, sir, water went three or four feet above it.

Q. Now tell us, in your own way, what you know about the finding of this open port hole?

A. Well, it was my watch below and I was called out to go down into the lower steerage to clear the scuppers. I did not know anything at the time, that the port was open, I was not told about it, I was told to go down, and when I got down there the dead light was closed.

Q. Had the cargo been disturbed at all when you went down?

A. No, none whatever.

Q. Was the cargo above or beneath the dead light?

A. Beneath.

Q. How much beneath?

A. I should say, roughly, a couple of feet.

Q. Was it possible to get from the hatch to the dead light across the cargo?

A. Yes.

Q. Was there any difficulty about that?

A. None whatever.

Q. What was the cargo, in a general way, in that hold?

A. Jute, that is, that bagging stuff.

Q. What was its condition, was it wet when you saw it?

A. Yes.

Q. What did you do?

A. Started to clear away over the port scupper.

Q. Why was that?

A. Because that one was clogged up. The straps upon the bail was broke, and over the dunnage, overhanged, over the scupper, the weight of the water bursted the bail, so that it would hang over the scupper.

Q. And that clogged it up?

A. And that clogged the scupper up, the other scupper was perfectly clear.

Q. Was there water there then or had it run down?

A. There was very little there then at the time, no more than two inches, if it was that.

Q. What was the effect of the water upon this bagging stuff?

A. It made it swell.

Q. And what was the effect of the swelling upon the bands with which it was bound?

A. It broke part of them.

Q. So that the swollen bagging came over and clogged this scupper?

A. That one particular one, yes.

Q. You did not know, yourself, anything about the open port, I understand, until you were told to go down?

A. Not until I was told to go down, by the captain.

Q. How about the dunnage, was that proper?

A. It was properly dunnaged.

Q. Do you know how this occurred?

A. No, sir, I do not.

Q. You were told that it had been found open?

(Objected to.)

A. After I went down there.

Q. Did you look at the dead light when you were down there?

A. Not until after we got the scupper clear.

Q. Did you look at it then?

A. Yes, it was properly secured then.

Q. Did you see anything wrong with it?

A. No, sir.

Q. Can you understand how it could have been opened?

A. No, I do not.

Q. Now, when you got into Philadelphia, did you see these ports, dead lights, especially the starboard dead-light of No. 3, lower steerage, again?

A. Yes, sir.

Q. What was your duty on arrival in port after cargo is taken out?

A. To inspect the hold and see that it is ready to go in again.

Q. Did you inspect it on this occasion in Philadelphia?

A. I did.

Q. What was the condition of the dead lights, especially of this No. 3 lower steerage starboard dead light at that time?

A. It was all right.

Q. Was there any new cover put on it?

A. None whatever.

Q. Was it repaired in any way?

A. No way at all.

Q. Would you have noticed it?

A. I would have—it would have been reported to me before they cleared bill for it.

Q. You feel sure that it had not been repaired?

A. I feel sure about that, yes.

(Mr. Paul offers the Log Book marked "B. I. M., Dec. 28, '97.")

(Objected to by Mr. Cheyney.)

Cross-examination.

BY MR. CHEYNEY.

Q. Mr. Dickson, have you any particular recollection of having made an inspection of the port in question prior to the departure of the Indiana from Liverpool?

A. From Liverpool?

Q. Yes?

A. Yes, sir.

Q. How did you come to make a particular inspection of this port?

A. Not of the one, not of that one particular one, but of all the hold, all the steerages, for this reason, on leaving Liverpool, the steerages sometimes we use them, the holds, for steerage passengers, and we are very particular about the steerage, because we can't say to the last minute whether they are going to use them for steerage passengers or not.

Q. Your recollection is, that you made an inspection of all the port holes in that particular compartment, No. 3?

A. And the shore captain as well, in Liverpool.

Q. You don't know anything about what he did?

A. I know that he was there.

Q. But you don't know what he did there? Was he there with you?

A. I was going down when he was coming up.

Q. But you don't know what he did when he was down there?

A. No.

Q. You say you don't know until the last moment before leaving Liverpool—

A. Not the last moment, twenty-four or forty-eight hours—sometimes as late as six hours, that there is no cargo, and sometimes we use it for steerage passengers.

Q. What time of the year was this? May, the latter part of May?

MR. PAUL.

Yes.

MR. CHEYNEY:

Q. What did you do, when you made that examination, how did you make it?

A. I go around and try the bolts with my fingers.

Q. You simply went around and tried the bolts to see whether they were fastened or not?

A. Yes.

Q. How many ports are there in that No. 3 lower steerage?

A. I am not sure, but I think there are six.

Q. How large is that hold?

A. I should say about, nearly twelve inches in diameter.

MR. PAUL: Feet you mean.

A. Do you mean the dead light or hold?

MR. CHEYNEY: The hold.

The Witness: I don't know, sir.

Q. How high is it?

A. 7½ feet.

Q. How long is it?

A. I should say about twenty feet, that is guessing. I don't know.

Q. You can give a fairly good guess. How wide is it?

A. About fifty feet. About that.

Q. The whole expanse, from one side of the ship to the other?

A. Yes.

Q. Where was the port light that you understand became open?

A. Starboard after one.

Q. There are three on each side, are there?

A. I think there is.

Q. How much water was there when you went down in that hold, No. 3 lower steerage?

A. About an inch and a half to three inches on the port side, the starboard side was all clear at the time.

Q. The burlaps were quite wet?

A. They were quite wet. Of course, the water coming in through that port would go over the top of the burlap and soak down.

Q. Are you in the habit of opening the hatches during the voyage in this hold?

A. No.

Q. Do you know how it was discovered, that there was some trouble about this hold in this particular voyage?

A. Only by the soundings; did not know what was the cause of it at the time; the soundings indicated there was that much water in that hold.

Q. Are you in the habit of sounding down into each hold during the voyage?

A. Yes, sir, every twenty-four hours, sometimes every six hours, four hours, or eight hours, all according to the weather.

Q. Your supposition is there was found an extra amount of water in the hold and the hatches were opened?

A. They were opened.

Q. This was not the lower hold, was it?

A. Where the water was?

Q. Yes?

A. The lower hold.

Q. Do you know how long after it was discovered there was trouble there that you went down into the hold?

A. No, I do not.

Q. You don't know who was down there first?

A. Who was down there? The carpenter and chief engineer, I believe, I am not sure.

Q. Who was the chief Engineer?

A. Devlin, his name was.

Q. Where is he now?

A. I could not say, he is not with the Company any longer.

Q. Where did he hail from? Do you know?

A. Scotland, somewheres.

Q. Did he not live in America?

A. Yes, he lived in America, had his home in Newark, somewhere, I believe. He hailed from Scotland.

Q. Was his name Devlin or Dowlin?

A. Devlin, I think it is spelled.

Q. Of course, all the recollection you have about your examination is, that prior to the departure of the vessel from Liverpool you went around and tried all of the bolts, as it was your duty to do, to see whether they were tight or not, and your recollection is that all were tight?

A. They all were tight.

Q. How are those port lights built in the "Indiana," do they open upwards?

A. The dead light, that is the glass part, opens fore and aft, but the dummy or cover opens up and down.

Q. Let me understand: there is an iron dummy or cover which opens up and down, which fits over the glass?

A. The glass dead light.

Q. The glass dead light, which opens fore and aft. Each one of those, that is the iron dummy or cover, and the dead light, have separate screws or bolts?

A. Yes, they are on separate hinges, and have separate bolts.

Q. Were both of those closed at the time of the departure from Liverpool?

A. They were.

Q. Could you examine the screws of the port light without opening the dummy or iron cover for the port light?

A. You could not close the dummy unless the dead light was properly closed and screwed.

Q. You could not?

A. No.

Q. You could not examine that from outside?

A. You could see from outside.

Q. You could see that it was closed?

A. Yes.

Q. How was it constructed that you can see that?

A. It is snug. That is, in the hold of the ship the dead light closes snug, just the same as that door; you can tell if it is ajar or not from a little distance by looking at it.

Q. You could not tell that if the iron dummy or cover was closed?

A. The dummy would not close properly unless the dead light was closed properly.

Q. Of course, you assumed that the port light was closed properly? You made no other examination than

that, from the fact that the dummy was closed? You made no other examination. You simply looked to see if the dummies were properly closed?

A. Yes.

Q. Who made these entries in regard to the accident?

A. The officer's signature is there.

Q. You did not make the entry?

A. No, sir.

Q. Who was H. C. Chapman?

A. He was the Chief Officer.

Q. Where is he now?

A. Not in the employ of the company.

Q. Whose handwriting is that? (indicating.)

A. That is Chapman's handwriting, or Forbes, Forbes's signature is at the bottom. That was Forbes's watch at the time this went on: his watch started at 8 in the morning.

Q. Do you know Mr. Chapman's handwriting?

A. Yes.

Q. Is this part of the book in Chapman's handwriting?

A. Yes, sir. The chief officer keeps this book altogether: the officers keep the scrap log which this is copied from.

MR. PAUL.

Q. Whose watch was it to which that entry belongs?

A. Forbes.

Signature waived.

97 And afterwards, to wit, on the 28th day of April, A. D. 1899, opinion of the court being filed, is in the words and figures following, to wit:

In the District Court of the United States for the Eastern District of Pennsylvania. In Admiralty.

THE FARR AND BAILEY MANUFACTURING COMPANY
vs.
INTERNATIONAL NAVIGATION COMPANY. } No. 62 of 1895.

McPHERSON, *District Judge:*

This action is brought to recover damages to cargo under the following state of facts. The respondent is the owner of the steamship "Indiana," a vessel plying between the ports of Liverpool and Philadelphia. In May, 1895, twenty bales of burlaps in good condition were received by the vessel in Liverpool, consigned to the libellant, in Philadelphia, and a bill of lading was given therefor.

The bales were stowed with some other goods in compartment No. 3 of the lower steerage deck; but the compartment was not full, only one tier of cargo, two or three feet high, covering the floor, so that access to the ports was very easy and unobstructed. Four or five days after the vessel left Liverpool water was discovered in the compartment; and when the hatches were opened, a day or two later, it was found that the after part on the starboard side was admitting water freely as the vessel rolled. Both covers of the port were unfastened and open, but there was no sign of injury to either, or to the surroundings of the port. No severe weather had been encountered, and no accident was known to have happened to the vessel. The parts in the compartment were inspected the day before the vessel sailed, and were believed to be closed; but several hours elapsed between the time of inspection and the time of sailing. The respondent's burlaps were injured by the water thus taken into the ship, and the present suit has been brought to determine the respondent's liability.

It is conceded that the case requires the court to decide what bearing the so-called Harter act of July 1, 1893, (vol. 2, Supp. Revised Statutes, page 81) has upon the rights of the parties; for it is clear that if this statute has made no change in the respond-
98 ent's obligation to furnish a seaworthy vessel, the libellant is entitled to recover. As was said in the Morrison, 153 U. S., 215, "the obligation rested on the owners to make such inspection as would ascertain that the caps and plates were secure. Their warranty that the vessel was seaworthy in fact did not depend on their knowledge or ignorance, their care or negligence. The burthen was upon them to show seaworthiness, and if they did not do so they failed to sustain that burthen, even though owners are in the habit of not using precautions which would demonstrate the fact." This burthen the present respondent also did not sustain, for the evidence before us does not show affirmatively that the vessel was seaworthy when the voyage began. The best that can be said of

the proof is, that it leaves in doubt the question, how and when the port came to be opened; and such uncertainty would not relieve the carrier from liability under the rule above quoted.

The respondent contends, however, that the third section of the act of 1893 provides the needful relief. The positions are: First, that the respondent used due diligence to make the vessel "Indiana" in all respects seaworthy, and properly manned, equipped and supplied; and therefore that the respondent cannot be obliged to make good the libelant's loss, because such loss arose from a fault or error in navigation or in the management of the vessel; second, that even if the loss occurred, not from a fault of navigation or management but from unseaworthiness at the beginning of the voyage, the act has so modified the respondent's obligation to furnish a seaworthy vessel, that if due diligence was used in that behalf the respondent is not liable to make good the loss.

Taking up the second position first, it must be conceded that the third section of the statute arouses some such expectation as the respondent supposes to be enacted into law. The section begins by saying, "that if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied," and after this beginning one naturally expects to hear that, if the statutory condition of diligence be fulfilled, the vessel and her owners shall be relieved from at least some of the liabilities caused by unseaworthiness.

But we do not hear this at all. Even if the statute intended to replace the carrier's obligation to furnish a seaworthy vessel by the less extensive obligation to use due diligence to furnish such a vessel, the intention has not been expressed. The section goes on to provide, not that the carrier's warranty of seaworthiness shall be modified, but merely this: "neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel; nor shall the vessel, her owner or
99 owners, charterer, agent or master, be held liable for losses arising from dangers of the sea or other navigable waters," or from other causes not now important. In other words the section does not touch, and therefore leaves unchanged the carrier's liability for unseaworthiness; and this, as we understand the decision of the Supreme Court, has already been decided by that tribunal.

In the case of the Delaware, 161 U. S., 459, the general scope of the act was considered, and it was decided that its whole object was "to modify relations previously existing between the vessel and her cargo." It was accordingly held that the general language of section three, which is broad enough to cover a case of collision did not relieve an offending vessel from liability for such a wrong, although it was caused by a fault in the navigation or management of the vessel. In the Carib Prince, 170 U. S., 655, the court says, distinctly, referring to section three: "The exemption of the owners or char-

terers from loss resulting from faults or errors in navigation or in the management of the vessel, and for certain other designated causes, in no way implies that because the owner is thus exempted when he has been duly diligent, that thereby the law ...s also relieved him from the duty of furnishing a seaworthy vessel. The immunity from risks of a described character, when due diligence has been used, cannot be so extended as to cause the statute to say that the owner, when he has been duly diligent, is not only exempted in accordance with the tenor of the statute from the limited and designated risks which are named therein but is also relieved as respects every claim of every other description, from the duty of furnishing a seaworthy ship." In the latest opinion upon the statute, to be found in the Sylvia, 171 U. S., 462, the effect of the decision in the Carib Prince was stated to be, that the act "has not released the owner of a ship from the duty of making her seaworthy at the beginning of her voyage." These cases furnish a sufficient reply to the respondent's second position. We understand them to rule that the obligation of the owner to furnish a seaworthy ship is now just what it was before the act of 1893 was passed. In order to fulfill that obligation he must show more than due diligence; he must show as heretofore that he has in fact furnished a seaworthy vessel; and if he fails in his proof, he is still liable for an injury arising from an unseaworthy condition.

This brings us to the consideration of the first position, which might present two questions of fact: First, was the respondent's ship unseaworthy when she left the port of Liverpool, and did this condition cause the loss? And, second, if the loss was caused, not by unseaworthiness, but by faults of navigation or management, had the respondent used due diligence as required by the act? As we look at the evidence it will only be necessary to answer the first question. We have little difficulty in coming to the con-
100 clusion that the vessel was a staunch boat, properly manned, equipped and supplied; and that she was in all respects fit for the voyage, except in the one respect of which the libellant complains—the condition of the after port on the starboard side in compartment No. 3. Concerning the condition of this port at the beginning of the voyage the testimony is unsatisfactory. Some of the respondent's witnesses testify with positiveness that both covers were closed and screwed fast when the vessel sailed; and if this testimony is accepted as true it establishes the fact that the port was properly fastened. But some of the witnesses upon this point are scarcely credible, and we regard the others as mistaken. The effect of the defendant's testimony is at least balanced, if not overbalanced, by the unquestioned fact that although the ship had experienced no severe weather, and displayed no mark of injury to the port, nevertheless both covers were found open a few days after the vessel began her voyage. In our opinion, this condition of affairs can only be fairly explained, either by supposing that the witnesses who testified with such positiveness must have been mistaken, and that the port was not properly fastened when the vessel left Liverpool (although they may have honestly supposed it to be

in a proper condition); or by supposing that after the witnesses who testified that the port was closed, had seen it for the last time, the covers were opened by some unknown person. Either supposition is more probable than to suppose that the port was broken in by a violence that left no sign, or was opened by a person who forced his way into the compartment after the hatches had been battened down. We therefore find as a fact that the port in question was either not fastened at all, or was insecurely fastened, when the vessel left Liverpool. In either event it follows that the vessel was not seaworthy.

In our view of the case this finding is decisive of the controversy and accordingly we direct a decree to be entered adjudging the respondent to be liable for the damage complained of by the libellant and referring the case to a commissioner to determine the extent of the loss.

And afterwards, to wit, on the 5th day of May, A. D. 1899, the petition of the respondent for reargument of the cause is presented and on the 9th day of May, A. D. 1899, a reargument is by the court allowed and said petition being filed is in the words and figures following, to wit:

101 In the District Court of the United States for the Eastern District of Pennsylvania. In Admiralty.

FARR AND BAILEY MANUFACTURING CO. *vs.* INTERNATIONAL NAVIGATION COMPANY. } No. 62 of 1895.

To the Honorable John B. McPherson, judge of the said court:

The petition of The International Navigation Company, respondent, respectfully requests:

That a reargument be directed in this case by the court upon one point only which does not appear to be fully covered in the opinion filed, viz:

Assuming, as found by the court, that the port light on starboard side of No. 3 lower steerage of the S. S. "Indiana" was open or insufficiently fastened at the time the vessel sailed on her voyage, did such fact render the vessel unseaworthy under the authorities and the other facts of the case as found by the court.

It is respectfully submitted that the Supreme Court of the United States in the case of the "Silvia," 171 U. S., 462, decided that a porthole left open or insufficiently fastened at the time of sailing did not render a vessel unseaworthy provided the porthole was of easy access and could be readily fastened, if necessary. The facts in the case of the "Silvia" were precisely those of the present case in every particular except that both glass and iron covers were left open or unfastened in this case and the iron cover only in the case of the "Silvia." This difference, however, can hardly be held to decide the question of seaworthiness.

In the English cases cited in the "Silvia," which are approved by the Supreme Court (Carmichael *vs.* Liverpool Ship Owners' Association, 19 Q. B. D., 242; Dobell *vs.* S. S. Co., Ld., 2 Q. B., 408, and others), portholes of greater dimensions and equally liable to admit the water, as in the present case, open or insufficiently fastened, existed at the time of sailing. It was held under the rule of Steel *vs.* State Line, 3 Appeal Cases, 72 (also cited with approval in the "Silvia"), that the test was not whether the porthole was open or not, but whether or not it could be readily closed in order to determine the question of seaworthiness.

102 Otherwise it is difficult to see where the line could be drawn. We all know that many portholes are invariably left open on board every steamship until rough weather arises; often through an unexpected surge water enters through these and great damage is done, but no one pretends that this renders the vessel unseaworthy. The same rule is true as to many appliances which are necessary for the safety of those on board, but which need not always be rigged or placed until the necessity arises. The failure to have these precautions taken constitutes negligence in the management or navigation of the vessel (as also decided in the "Silvia") but not unseaworthiness.

Respectfully submitted.

J. RODMAN PAUL,
For Int. Nav. Co., Resp.

And afterwards, on the 22d day of June, A. D. 1899, the opinion of the court on the reargument of this cause being filed is in the words and figures following, to wit:

In the District Court of United States, Eastern District of Pennsylvania. In Admiralty.

FARR AND BAILEY MANUFACTURING CO.
vs.
INTERNATIONAL NAVIGATION CO. } No. 62 of 1895.

Upon reargument.

MCPHERSON, *J.*:

The only question to be considered upon this reargument is, whether the court was right in concluding that the vessel was unseaworthy when she left Liverpool. If the point were now presented for the first time, so that it might be decided in accordance with the reasoning that appeals most strongly to my judgment, I should adhere to the conclusion already stated.

It seems to me, that although the owners of the vessel provided the proper equipment for the porthole under consideration, and although the failure to close it properly was due to negligence in the use of such equipment, nevertheless the result was unseaworthiness, because the vessel set sail with a hole in her side that

103 was not only unknown to her officers but was believed not to exist. She was therefore not in a condition to afford due

protection to the cargo in this particular compartment. If the hol had been caused by collision while she lay at her berth and sh had been sent upon her voyage without repair it could not be suc cessfully asserted that she was seaworthy, although the proper tool and materials might have been among the ship's stores, and th failure to repair might be properly said to have been due to negli gence in failing to use the equipment at hand.

The state of affairs produced by negligence seems to me to b more important than the character of the negligent act; and there fore, if at the time when a voyage is begun there is an open port i a cargo compartment, I should incline to the opinion that one ele ment, at least, of unseaworthiness was present. This might not b decisive it is true, for another important inquiry, I think, should b this: Was it known to the proper officers that the port was eithe open or insecurely fastened? Obviously, it would be unreasonabl to require a vessel to leave her berth with all her portholes close and to keep them closed at her peril during the voyage. But porthole that is known to be open in a cargo compartment, and porthole that is mistakenly supposed to be closed when the voyag begins, are likely to receive different degrees of attention, and migh properly give rise to different degrees of liability. Such a port when known to be open, must be borne in mind by those respons ble for the care of the vessel and of her cargo, and must be promptl closed when danger threatens. Therefore, the port should be read ily accessible, so that it may be closed in a few minutes; and th ship would be unseaworthy if the cargo should be so disposed tha the port could not be easily reached. But a port in such a com partment, when mistakenly supposed to be closed, while it is actu ally open or insecurely fastened, is no longer an object of attentio or care. Whether, therefore, it be accessible or not seems to be little importance, for there is no intention to get to it for any pur pose until the voyage is over. Meanwhile the mischief may b doing. The water may be invading the compartment and dam aging the cargo, while the master of the vessel is relying upon hi mistaken belief that the porthole was closed when the voyag began.

Such a mistake, as it seems to me, is not accurately described a a fault or error in the navigation or management of the vessel Failure to close an accessible port would, no doubt, be such a faul or error in management if the port was known to be open; but the port was mistakenly supposed to be shut when the voyage wa begun this appears rather to be a fault in fitting the ship for th voyage, and a fault that is committed before the vessel sets sai The master leaves the dock with a cargo compartment supposed t be tightly closed. If he owes to the cargo a duty continuall
104 to inspect the ports and damage is done by reason of neglecte inspection such neglect might be a fault in managemen But it has not been suggested that such a duty exists under ord nary circumstances; and I do not clearly see what other duty management the master can be said to neglect. There is a duty t provide against the danger that water may enter an open port; bu

in the case supposed the master believes that the duty to close was performed before the voyage began, and has no knowledge that the port is open. If, therefore, he has no ground to suspect that the port is open and is ordinarily under no duty to inspect continually it seems more reasonable to rest his liability for whatever injury may be done upon the mistake he made in preparing the compartment for the voyage. There is some force, I think, in the suggestion that such a mistake cannot properly be called a fault or error in a navigation or management that had not then been begun. It might perhaps be said that the law regards such a mistake as repeated during every moment of the voyage; but I think this would be a subtlety of legal fiction, not necessary for the accomplishment of justice. It is no doubt true that it is not always easy to draw a line between defects that may properly be said to constitute unseaworthiness and omissions or acts that may be more properly described as faults or errors of navigation or management. Failure to provide a compass, for example, might fall into either class, and so with other instances that might be specified. But this would only be to say again what courts are continually saying, that no rule could be laid down for all cases, and for that reason I should prefer to confine my attention to the particular question before the court in a given case.

While the foregoing is perhaps a sufficient indication of the reasons that appeal to my judgment in behalf of the disputed conclusion, nevertheless I must admit that further consideration has convinced me that I am not at liberty to allow them to control the decision.

Some of the cases cited by the respondent can be distinguished without difficulty, and some are not of binding authority; but I am unable to avoid the effect of the decision in the Sylvia, 171 U. S., 462. I am afraid that I somewhat more than half shut my eyes to the facts of that case. They are strikingly like the facts in the present controversy, so like indeed, that I feel myself bound to accept the conclusions drawn from them by the Supreme Court. I obey the authority of that tribunal, therefore, and now hold that the condition of the porthole when the "Indiana" left Liverpool did not render the vessel unseaworthy. It follows that failure to close the port was a fault or error in management committed during the voyage, and that the act of 1893 relieves the respondent from liability for such a fault.

A decree will be entered dismissing the libel with costs.

105 And afterwards, to wit, on the 10th day of July, A. D. 1899, decree being entered is in the words and figures following, to wit:

In the District Court of the United States, Eastern District of Pen
sylvania. In Admiralty.

FARR AND BAILEY MANUFACTURING CO.
vs.
INTERNATIONAL NAVIGATION CO. } No. 62 of 1895.

And now, to wit, this 10th day of July, 1899, this case coming
to be heard on final hearing, and after reading the pleadings a
proofs and hearing the arguments of the respective proctors,
motion of J. Rodman Paul, proctor for the respondent, it is order
adjudged and decreed that the libel be dismissed, and that the
spondent The International Navigation Company, have and
cover from the libellant, The Farr and Bailey Manufacturing Co
pany, and Edward H. Kennedy, its stipulator, its costs.

And afterwards, to wit, on the 26th day of July, 1899, the lib
lants, The Farr and Bailey Manufacturing Company, by their pr
tors, Horace L. Cheyney, Esq., and John F. Lewis, Esq., pres
their petition for leave to appeal from the decree of the court
this cause, to the next United States circuit court of appeals, for t
third circuit, together with an assignment of errors, and the app
is allowed upon the usual conditions; and said appeal being fi
is in the words and figures following, to wit:

In the District Court of the United States, Eastern District of Pe
sylvania. In Admiralty.

FARR AND BAILEY MANUFACTURING CO.
vs.
INTERNATIONAL NAVIGATION CO. } No. 62 of 1895.

106 To the Honorable John B. McPherson, judge of the distr
court of the United States for the eastern district of Pe
sylvania:

The petition of The Farr & Bailey Manufacturing Company,
libellants, respectfully represents:

That they have heretofore filed a libel against the Internatio
Navigation Company, to recover the sum of $2,084.15, for dam
to twenty bales of burlaps, shipped on board the steamship "
diana," owned by the respondents.

That on July 10, 1899, a final decree was entered dismissing
libel and ordering the respondents recover from the petitioner,
Edward H. Kennedy, stipulator, costs to be taxed.

Your petitioner believes that said decree is erroneous and t
injustice will be done if the same should be carried into effect
leave is therefore prayed to appeal from the said decree to the
cuit court of appeals for the third circuit.

HORACE L. CHEYNEY,
JOHN F. LEWIS,
Proctors for Petitione

I do hereby certify that I am proctor for The Farr & Bailey Manufacturing Company, the petitioner, and that said company has no office or agent within this district, and that the above appeal is not taken for delay.

HORACE L. CHEYNEY.

Assignments of Error.

1. The learned court erred in entering the decree of July 10, 1899, dismissing the libel.
2. The learned court erred in not entering a decree sustaining the libel and awarding the libellant the damages claimed.
3. The learned court erred in finding that the steamship "Indiana" was in a seaworthy condition when she left Liverpool.
4. The learned court erred in not finding the cargo was damaged by reason of the unseaworthiness of the steamship "Indiana."
5. The learned court erred in finding that the damage to the cargo was caused by an error in the management of the vessel committed during the voyage.

HORACE L. CHEYNEY,
JOHN F. LEWIS,
Proctors for Appellant.

107 And on the same day the stipulation of the parties setting forth in writing what papers shall constitute the record on appeal in this cause being filed, is in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Third Circuit.

FARR & BAILEY MFG. CO., Libellant, Appellant,
vs.
THE INTERNATIONAL NAV. CO., Respondent, Appellee.

It is hereby agreed that the following papers contained in the record as filed shall not be printed:
Stipulation for cost.
Writ of attachment.
Stipulation as to record on appeal.
Bond on appeal.
Certificate of the clerk.

HORACE L. CHEYNEY,
JOHN F. LEWIS,
Proctors for Appellant.
BIDDLE & WARD,
Proctors for Appellee.

108 In the United States Circuit Court of Appeals for the Thi
Circuit.

THE FARR AND BAILEY MANUFACTURING COMPANY, Appellant
vs.
THE INTERNATIONAL NAVIGATION COMPANY, Owner of the Steam
ship "Indiana," Appellee.

And afterwards, to wit, on the twenty-first day of September, A.
1899, this cause being called for argument on the transcript of r
ord from the district court of the United States for the east
district of Pennsylvania, before Hon. M. W. Acheson, Hon. Geo
M. Dallas, and Hon. George Gray, circuit judges, and being argu
by counsel for the respective parties, and the court, not being fu
advised in the premises, takes further time for consideration there

And afterwards, to wit, on the twenty-eighth day of Novemb
A. D. 1899, comes the parties aforesaid, by their counsel aforesa
and the court, now being fully advised in the premises, renders t
following opinion, to wit:

109 In the United States Circuit Court of Appeals, Third Circu
September Term, 1899.

THE FARR AND BAILEY MANUFACTURING COMPANY, Appellant,
vs.
THE INTERNATIONAL NAVIGATION COMPANY, Appellee. } No.

Appeal from the district court of the United States for the east
district of Pennsylvania.

Before Acheson, Dallas, and Gray, circuit judges.

DALLAS, *Circuit Judge:*

By the libel filed in the court below damages were claimed
injury done by sea water to several bales of burlaps which were
ceived on board the steamship Indiana at the port of Liverp
consigned to the libellant in Philadelphia. These goods were stow
in a compartment on the lower steerage deck in such manner as
admit of free access being had to the port through which the wa
subsequently entered. This port, and others similarly situat
were inspected on the day before the vessel sailed, and they w
believed to be closed and properly fastened, but after the India
had proceeded for four or five days upon her voyage, water made
appearance in the compartment, and a day or two later investi
tion disclosed that both the glass cover and the iron dummy of
port in question were open, and that through this opening
water was admitted. There had been no severe weather, no a
dent was known to have happened, and the port, its covers, fast
ings, and surroundings, did not appear to have been in any w
broken or impaired.

The bearings upon the case thus presented of the act of Congress of July 1, 1893, known as the Harter act, is now for consideration. The third section of that act provides that "if the owner of any vessel transporting merchandise to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned,
110 equipped and supplied, neither the vessel, her owners, agents or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel."

This act has not modified the obligation of owners to furnish a seaworthy ship. The Delaware, 161 U. S., 459; the "Carib Prince," 170 U. S., 655; the "Silvia," 171 U. S., 462. Did the damage in question result from unseaworthiness? Respecting its immediate cause there can be no doubt—it was the condition of the port. Was this condition chargeable to unseaworthiness or should it be ascribed to lack of due care, skill, or judgment on the part of those engaged in navigating and managing the vessel? The definition of seaworthiness which the learned counsel for the appellee has supplied from Carver on Carriers, sec. 18, page 20, is, so far as it is here material, that "the ship must be fit in design, structure, condition, and equipment;" and, although the Indiana seems to have been structurally fit, her "condition" as respects the port in question, was, we think, palpably unfit. The learned judge of the court below found as a fact that it "was either not fastened at all or was insecurely fastened," and this finding is quite consistent with the contention of the appellee's counsel that it was not open at the time of sailing. The impression made upon us by the evidence is that it was probably closed, but, be this as it may, certain it is that it was not securely fastened, and we are of opinion that, by reason of this fact, the vessel was unseaworthy, for the conclusion is inevitable that a ship with a hole in her side, which those in charge of her navigation suppose, and have a right to assume, is tightly closed, but which, in fact, had been so inadequately fastened as to admit of its being opened by ordinary pressure of the sea, and so permit the water to flow in upon the cargo, does not "have that degree of fitness which an ordinary, careful, and prudent owner will
111 require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it;" and "to that extent * * * the ship-owner undertakes absolutely that she is fit, and ignorance is no excuse." Carver on Carriers, *supra*. It has, however, been contended that the master of the Indiana had no right to assume that the covers of this port had been properly secured, but should himself have made timely discovery that they had not been, and therefore that his omission to have them made fast during the voyage and before the damage had been done was a fault in navigation or in management, for which the vessel is not liable. We cannot sustain this contention. The record shows that the custom was to close and securely fasten all such ports before sailing, and that in this instance this practice, except as to this one port, was effectually pursued. The master

was, of course, not responsible for the vessel's general fitness of condition, and, this being so, we are at a loss to conceive upon what ground neglect could be imputed to him by reason of his not having seen to the condition of this particular part of the ship at a time when its unfit condition had not become known to him. This case was twice argued in the court below. Upon the first occasion the learned judge directed a decree to be entered for the libellant, but upon reargument he dismissed the libel. In all that he said in support of the conclusion which he first announced we fully concur; but we are unable to acquiesce in the result which he finally reached because we cannot agree that it was rendered necessary by the decision in the case of the "Silvia," 171 U. S., 462. The facts of that case and of this one, though similar, are not precisely the same, and the differences between them, though seemingly slight, are, when considered with reference to the reasoning upon which the judgment in the "Silvia" case was founded, of con-
112 trolling importance. It was there said that "the test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport," and, applying this test, it was held that the "Silvia" was not, under the circumstances there presented, to be regarded as being unseaworthy merely because at the time of sailing, when the weather was fair, and with the glass covers tightly closed, the iron covers of some of her ports were left open to light the compartment. There was in that case, as in this one, no structural defect or omission of appliances, and the question there, as here, was only as to fitness of condition. The compartment involved contained no cargo, but only spare sails and ropes and a small quantity of stores. The ports were in a place where the iron shutters would usually be left open for the admission of light, and there was nothing to prevent or embar-rass access to them in case a change of weather should make it necessary or proper to close them. In the afternoon of the day of sailing rough weather was encountered, the glass cover of one of the ports was broken, and the water came in through the port and damaged the cargo, and this damage, it was held, was occasioned not by unseaworthiness, but by fault or error in the navigation or in the management of the ship, because the control during the voyage of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas is included in navigation and management, and consequently the neglect to close the iron covers of the ports was in that case ascribed to those in charge of the navigation and management, and not to those responsible for seaworthiness; but in the present case the port in question was not designedly left open, and its shutters ought not to have been left unfastened. They would not "usually be left open for the admission of light" or for any purpose.
113 They were believed by all concerned to have been securely closed, and that they would remain so throughout the voyage. It was neither intended nor expected that they would require or receive any attention at sea. It was not supposed that any control of them in the course of navigation and management would

be necessary, and no duty to exercise control existed, simply because no need nor occasion for it could have been foreseen or perceived. If, as in the "Silvia" case, the compartment in question had contained only tackle and stores, and if, as in that case, the glass cover had been closed, but the iron cover left open to admit light, it would unquestionably have been the duty of the master upon encountering rough weather to have had the iron cover closed; but he cannot be justly said to have committed either a fault or an error in omitting to remedy a defect of which he had no knowledge and for the existence of which he was in no way responsible.

The fact that in the "Silvia" case, as in this one, the cargo was not so stored as to prevent access to the port does not make the judgment in that case decisive of this one. There it was said that if the cargo had been so stored as to require much time and labor to shift or remove it in order to get at the ports the fact that the iron shutters were left open at the beginning of the voyage might have rendered the ship unseaworthy; but it was not decided that under all circumstances freedom of access to the ports of a vessel imposes upon those engaged in her navigation and management a duty to inspect them. On the contrary, it seems to us that what the court said about this matter accords with our present conclusion; for if a ship be "unseaworthy at the time of sailing by reason of the cargo having been so stowed against the open port that the port could not be closed without removing a considerable part of the cargo," it would seem that there must likewise be unsea-
114 worthiness whereever for any cause it would be unreasonable to expect the master to investigate a port which had not been fastened at the time of sailing, and that such expectation would not have been reasonable and in fact was not entertained in this case has already been shown.

The decree of the district court is reversed, and the case will be remanded to that court with direction to enter a decree adjudging the respondent to be liable for the damage complained of by the libellant, and referring the case to a commissioner to determine the extent of the loss.

115 In the United States Circuit Court of Appeals for the Third Circuit.

THE FARR AND BAILEY MANUFACTURING COMPANY, Appellant,
v.
THE INTERNATIONAL NAVIGATION COMPANY.

Appeal from the district court of the United States for the eastern district of Pennsylvania.

Before Acheson, Dallas, and Gray, circuit judges.

GRAY, *C. J.*:

I cannot agree with the majority of the court in the conclusion reached by them in this case. Entirely aside from the question of the applicability of the decision of the Supreme Court of the United

States in the case of the "Sylvia," I think the owners of the Indiana, on the facts disclosed in the record, are within the exemption provided for in the 3rd section of the act of Congress known as the "Harter act." If the ship, when she left port, was not defective in structure of equipment, she was, within every reasonable definition of the term, seaworthy. There is no suggestion that her equipment in the matter of ports or dead-lights was defective. If properly equipped with hatch coverings and tarpaulins, it does not render a ship unseaworthy if they are left open or insecurely fastened. If they are, it is a fault of the navigation or management.

So, if a ship is properly equipped with anchors and the requisite tackle for stowing them, it does not render her unseaworthy if on leaving port the anchors are allowed to swing from the catheads, whereby there is danger of knocking a hole in the bows when the ship encounters head seas. It is a fault of the management and navigation to so leave them.

In the case of Headley *v.* Pinckney & Sons S. S. Co., App. Cas. 1894, 222, a ship sailed with stanchions and rails on board, but not set up as they ought to have been. A storm coming on, a 116 seaman engaged in performing his duty fell overboard in consequence of the neglect to ship the stanchions and rails and was drowned. The House of Lords held that this was a neglect of duty, but did not render the ship unseaworthy. Lord Herschell said:

"After she left port her hull and equipment remained precisely what they were at the time of her departure. She was in all respects efficiently equipped; the fault was in not making use of the equipment with which she had been furnished." * * * "The failure to properly secure many parts of the ship which are in ordinary practice open from time to time would no doubt diminish the safety of those serving on board her, and be a source of danger to them, but I do not think it could be reasonably said that because in such a case a bolt was not securely fixed the vessel therefore became unseaworthy."

The reasoning in the case of the "Sylvia," 171 U. S., 462, however, seems to me on every point applicable to the present case and to be of binding authority on this court, as it was considered to be by the learned judge of the court below. The facts in that case were precisely like those in the present case, the only difference being that in the "Sylvia" the iron cover over the port was left open, while in the "Indiana" the glass cover was left open or insecurely fastened.

I think the decree in the court below should be affirmed.

117 United States Circuit Court of Appeals for the Third Circuit, September Term, 1899.

THE FARR AND BAILEY MANUFACTURING COMPANY, Appellant,
vs.
THE INTERNATIONAL NAVIGATION COMPANY, Owner of the Steamship "Indiana," Appellee. } No. 13.

Appeal from the district court of the United States for the eastern district of Pennsylvania.

This cause came on to be heard on the transcript of record from the district court of the United States for the eastern district of Pennsylvania, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, reversed with costs.

And it is further ordered that this cause be remanded to the said district court, with directions to enter a decree adjudging the respondent to be liable for the damage complained of by the libellant, and referring the case to a commissioner to determine the extent of the loss.

GEO. M. DALLAS,
Cir. Judge.

Philadelphia, December 1, 1899.

118 United States Circuit Court of Appeals for the Third Circuit, September Term, 1899.

THE FARR AND BAILEY MANUFACTURING COMPANY, Appellant,
vs.
THE INTERNATIONAL NAVIGATION COMPANY, Owner of the Steamship "Indiana," Appellee. } No. 13.

Appeal from the district court of the United States for the eastern district of Pennsylvania.

And now, to wit, this second day of January, A. D. 1900, it is ordered that mandate issue to the said district court of the United States for the eastern district of Pennsylvania in accordance with the opinion and decree of this court in said cause.

GEO. M. DALLAS, *Cir. J.*

Filed January 2nd, 1900.

119 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the district court of the United States for the eastern district of Pennsylvania, Greeting:

Whereas lately, in the district court of the United States for the eastern district of Pennsylvania, before you or some of you, in a

cause between The Farr and Bailey Manufacturing Company, ap
pellant, and The International Navigation Company, owner of th
steamship "Indiana," appellee, wherein the decree of the said distri
court entered in said cause is in the following words, viz:

"And now, to wit, this 10th day of July, 1899, the case comin
on to be heard on final hearing, and after reading the pleadings an
proofs and hearing the arguments of the respective proctors, on m
tion of J. Rodman Paul, proctor for the respondent, it is ordere
adjudged, and decreed that the libel be dismissed and that the r
spondent, The International Navigation Company, have and r
cover from the libellant, The Farr and Bailey Manufacturing Com
pany, and Edward H. Kennedy, its stipulator, its costs,
120 by the inspection of the transcript of the record of the sai
district court, which was brought into the United States ci
cuit court of appeals for the third circuit by virtue of an appe
agreeably to the act of Congress in such case made and provide
fully and at large appears;
121 And whereas in the present term of September, in th
year of our Lord one thousand eight hundred and ninet
nine, the said cause came on to be heard before the said Unite
States circuit court of appeals on the said transcript of record an
was argued by counsel:

On consideration whereof it is now here ordered, adjudged, an
decreed by this court that the decree of the said district court i
this cause be, and the same is hereby, reversed with costs, & tha
the said libellant and appellanf, The Farr and Bailey Manufactu
ing Company, recover against the said respondent and appelle
The International Navigation Company, owner of the steamshi
'Indiana,' seventy-two dollars and five cents for its costs herei
expended and have execution therefor.

And it is further ordered that this cause be remanded to the sai
district court, with directions to enter a decree adjudging the r
spondent to be liable for the damage complained of by the libellan
and referring the case to a commissioner to determine the extent
the loss.

Philadelphia, December 1st, 1899."

122 You, therefore, are hereby commanded that such exec
tion and further proceedings be had in said cause, in co
formity with the opinion and decree of this court, as according t
right and justice and the laws of the United States ought to be ha
the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of th
Supreme Court of the United States, at Philadelphia, the second da
of January, in the year of our Lord one thousand nine hundred.

WM. H. MERRICK,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

Costs of Appellant.

Clerk	$19.25
Printing record	32.80
Attorney	20.00
	$72.05

[Endorsed:] U. S. circuit court of appeals, third circuit. No. 13, Sept. term, 1899. Farr and Bailey Manfg. Co., appellant, *vs.* International Navigation Company. Mandate. Filed January 2, 1900.

123 United States Circuit Court of Appeals, Third Circuit, September Term, 1899.

Costs of Farr and Bailey Manufacturing Company in No. 13.

18—, Sept. term.—Docketing cause and filing record, $5.00; appearance, .50; filing precipe and receipt, .50; filing papers, $1.00	7 00
Filing briefs, $5.00; argument, .20; judgment, $1.00; filing same, .25; recording, .40; mandate, $5.00; preparing record for printer, etc., $7.00; cost of printing record, $25.80; attorney's docket fee, $20.00; costs and copy, .40	65 05
	72 05

Fee Book 2, page 238.

Test:

WM. H. MERRICK,
Clerk Circuit Court of Appeals, 3d Circuit.

124 UNITED STATES OF AMERICA, *ss:*

I, William H. Merrick, clerk of the United States circuit court of appeals for the third circuit, do hereby certify the foregoing pages from one to one hundred and twenty-four, inclusive, to contain a full, true, complete, and faithful copy of the original transcript of record in the case of The Farr and Bailey Manufacturing Company, appellant, *vs.* The International Navigation Company, owner of the steamship "Indiana," appellee, No. 13, September term, 1899, on file and now remaining among the records of said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this sixteenth day of January, in the year of our Lord one thousand and nine hundred, and of the Independence of the United States the one hundred and twenty-fourth.

Seal United States Circuit Court of Appeals, Third Circuit.

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

125 [Endorsed:] File No., 17,623. U. S. C. C. of appeals, 3rd circuit. Term No., 193. The International Navigation Company, petitioner, *vs.* Farr & Bailey Manufacturing Company. Filed January 29, 1900.

126 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the third circuit, Greeting:

Being informed that there is now pending before you a suit in which The Farr and Bailey Manufacturing Company is appellant and The International Navigation Company, owner of the steamship "Indiana," is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the eastern district of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
127 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fifth day of March, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

128 [Endorsed:] Supreme Court of the United States. No. 509, October term, 1899. The International Navigation Co. *vs.* Farr & Bailey Mfg. Co. Writ of certiorari.

129 In the United States Circuit Court of Appeals for the Third Circuit, September Term, 1899.

FARR & BAILEY MANUFACTURING COMPANY, Appellant,
vs.
THE INTERNATIONAL NAVIGATION COMPANY, Appellee. } No. 13.

It is hereby stipulated by the respective proctors in the above case that the certified copy of the transcript of record on file in the Supreme Court of the United States shall be taken as a return to the writ of certiorari granted on March fifth, 1900, by the Supreme Court of the United States in the case of The International Navigation Company, petitioner, *vs.* Farr & Bailey Manufacturing Company, October term, 1899, No. 509.

J. RODMAN PAUL,
Proctor for the International Nav. Co., Appellee.
HORACE L. CHEYNEY,
JOHN F. LEWIS,
Proctors for Appellants.

March 7, 1900.

130 UNITED STATES OF AMERICA, *sct:*

I, William H. Merrick, clerk of the United States circuit court of appeals for the third circuit, by virtue of the foregoing writ of certiorari and in obedience thereto, do hereby certify to the Supreme Court of the United States the consent of the counsel for the respective parties, thereto annexed, as my return to the said writ.

Seal United States Circuit Court of Appeals, Third Circuit.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this tenth day of March, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fourth.

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

131 [Endorsed:] File No., 17,623. Supreme Court U. S., October term, 1900. Term No., 193. The International Navigation Company, petitioner, *vs.* Farr & Bailey Manfg. Co. Writ of certiorari and return. Filed Mar. 12, 1900.

IN THE

Supreme Court of the United States.

Farr & Bailey Manufacturing Co.,
Appellees,
v.
The International Navigation Co.,
Appellant.

PETITION FOR WRIT OF CERTIORARI.

To the Supreme Court of the United States of America:

The petition of the International Navigation Company for a Writ of *Certiorari* directed to the Circuit Court of Appeals for the Third Circuit to bring before your Honorable Court the case of Farr & Bailey Manufacturing Company *v.* The International Navigation Company: said case being entitled in the Court Below as follows:

The Farr & Bailey Manufacturing Company,
Libellant-Appellant,

v.

The International Navigation Company, Owner of the Steamship "Indiana,"
Respondent-Appellee.

Your petitioner respectfully shows to this Court as follows:

First. Your petitioner is a corporation organized under the laws of the State of New Jersey, and a citizen of said State, doing business also in the State of Pennsylvania, and in the City of Philadelphia and elsewhere, and is and was the owner of the steamship "Indiana" at the time of the occurrences hereinafter described.

Second. In pursuance of a Bill of Lading printed in full in the record, p. 3, your petitioner agreed on or about the 21st day of May, 1895, to transport from Liverpool to Philadelphia upon the said steamship "Indiana," and deliver unto the libellants, Farr & Bailey Manufacturing Company, certain bales of burlaps therein mentioned and described; said bill of lading provided that the carrier shall not be liable for loss occasioned by accidents of navigation of whatever kind even when occasioned by the negligence, default or error in judgment of the pilot master, mariners or other servant of the ship owner, not resulting however in any case from want of due diligence by the owners of the ship, or by unseaworthiness of the ship at the commencement or any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness; and said contract was further subject to the Act of Congress of February 13, 1893, commonly known as the "Harter Act."

Third. The steamship "Indiana" left the port of Liverpool on May 22, 1895, fully manned, equipped and supplied; she was a staunch boat without defect of structure or equipment, in all respects seaworthy, unless the facts hereinafter mentioned rendered her unseaworthy.

Fourth. The bales of burlaps were received on board, in good condition, and were stowed with other goods in a compartment of the lower steerage, or between decks of the vessel (just below the main or passenger deck) which was frequently used from time to time for the conveyance of passengers and sometimes for cargo; there was but one tier of cargo, two or three feet high covering the floor, and access to the port holes, of which there were two on either side of the compartment, was easy and unobstructed. The ports were of the usual character and dimensions, fitted first with a glass window set in brass, over which could be screwed down an iron plate or covering called a "dummy," both window and dummy being fastened by nuts and screws. All parts of the port covers were in perfect condition.

Access to the between decks compartment was by a hatchway which was closed and battened down, but the hatch cover being in sections was capable of being opened without difficulty, and in a few moments.

Fifth. During the voyage some four or five days after leaving Liverpool, the starboard port hole aft of lower steerage No. 3, either worked or was forced open and the water poured through, and damaged some of the bags of jute. Upon discovering by the soundings that there was water in the hold, at 9 A. M. Tuesday, May 26th, the captain ordered the carpenter to go down into hold No. 3, which he did, having no difficulty in throwing aside a section of the hatch, descending and crossing over the cargo to the port hole, which he found open. He instantly closed and screwed it fast, without difficulty or delay; there was no imperfection or breakage of the port hole, or its equipment.

Sixth. In the compartment, the cargo did not reach within a foot or so of the lower rim of the port hole and

in no respect impeded the opening or shutting of the same. On the outside, taking the draft of the vessel fore and aft when she left Liverpool, the port hole was four feet and half an inch above the water level.

Seventh. So far, the facts are undisputed. It was claimed by your petitioner in the Court below and in the District Court that the ports of the compartment No. 3 having been admittedly inspected upon the day of sailing and found duly closed and fastened, the port hole in question must have been opened by some one on board the ship after sailing, or must have become forced open, although originally properly fastened, in some inexplicable manner. It has been found as a fact by the Court below and by the District Court that the port hole in question, although not open so that water could be admitted at the time of sailing, was insufficiently and insecurely fastened and afterwards was worked open by the action of the sea, or some other cause.

Eighth. Upon the arrival of the steamship "Indiana" at Philadelphia, and the discovery of the damage to the bales of burlaps belonging to libellants, the latter on or about the 16th day of August, 1895, filed their libel in the District Court of the United States for the Eastern District of Pennsylvania against your petitioner in an action *in personam.* In the Admiralty to recover damages for injury to the said cargo, and on or about July 31, 1896, your petitioner filed an answer to the said libel denying liability and setting up *inter alia* the said Act of Congress of February 13, 1893, commonly known as the "Harter Act."

Ninth. Thereafter the cause was argued before the Honorable William Butler, Judge of the United States District Court for the Eastern District of Pennsylvania, who however resigned the office of Judge before a decision was rendered; and afterwards the said cause was

again argued before the Honorable John B. McPherson, Judge of the said Court and on April 28, 1899, the decision of the Court was rendered sustaining the libel and referring the cause to a commissioner to determine the extent of the loss.

Tenth. Afterwards, to wit, May 5, 1899, your petitioner having moved for a reargument of the cause, upon the question "assuming that the port light was open or insufficiently fastened at the time the vessel sailed on her voyage, did such fact render the vessel unseaworthy under the authorities and the other facts of the case as found by the Court," and the reargument having been granted, the cause was again argued before Judge McPherson and on June 22, 1899, the opinion of the Court on the reargument of the cause was filed, dismissing the libel with costs. The said decision of the District Court held that the condition of the port hole, when the "Indiana" left Liverpool, did not render the vessel unseaworthy, and the failure to close the same was a fault or error in management from which the Act of 1893 relieved your petitioner from liability, basing the case principally upon the rule laid down in the case of *The Silvia*, 171 U. S., 462, from which rule, however, the learned Judge himself dissented.

Eleventh. From the decree of the District Court the libellants, the Farr & Bailey Manufacturing Company, appealed to the Circuit Court of Appeals for the Third Circuit where the cause was heard on September 21, 1899, before Judges Acheson, Dallas and Gray. By the decision of the Court filed November 28, 1899, a majority of the Court, to wit, Judges Acheson and Dallas, filed an opinion per Dallas, J., reversing the decree of the District Court and holding that your petitioner was liable for the damage to the cargo above

mentioned, because the steamship "Indiana" was rendered unseaworthy by the condition of the port hole in question when she sailed from Liverpool. While Gray, J., filed a dissenting opinion holding that your petitioners on the facts disclosed in the record were within the exemption provided for in the third section of the Act of Congress known as the "Harter Act," entirely aside from the question of the applicability of the decision of the Supreme Court of the United States in the case of the "*Silvia*," and further that "The reasoning in the case of the '*Silvia*,' 171 U. S., 462, however, seems to me on every point applicable to the present case, and to be of binding authority on this Court as it was considered to be by the learned Judge of the Court below. The facts in that case were precisely like those of the present case. The only difference being that in the 'Silvia' the iron cover over the port was left open, while in the 'Indiana' the glass cover was left open or insecurely fastened."

Twelfth. Your petitioner therefore shows to this Honorable Court that of the four Judges who have rendered decisions in the cause, two, to wit, Judges McPherson and Gray, have held that the case of the "*Silvia*" above mentioned decided by this Court, rules this cause in favor of your petitioner, and two Judges, viz., Judges Acheson and Dallas, have held that it does not.

Thirteenth. Accordingly the questions of law arising upon this record are as your petitioners are advised by counsel and verily believe, of sufficient gravity and public importance to render it proper in the interests of jurisprudence and uniformity of decision that the Supreme Court should review the conclusions reached by the majority of the Court of Appeals, and determine

(1) Whether assuming the port hole in question to have been insufficiently fastened, at the time of sailing, such a condition, in view of the other facts found by the Court, deprived the vessel owner of the exemption of Section 3 of the Harter Act.

(2) Whether the case is not ruled by the authority of the "*Silvia*," 171 U. S., 462, in favor of your petitioners.

Fourteenth. As your petitioner is advised and believes, the present case is one in which it is proper for this Court to issue a *certiorari* to ascertain whether the law has been followed by the Court below in this case.

Whereupon your petitioners pray that this Honorable Court may be pleased to grant a writ of certiorari in this case, to the said Circuit Court of Appeals for the third Circuit to bring up this case for its review and determination and for such other and further proceedings as it may direct.

THE INTERNATIONAL NAVIGATION CO.

Eastern District of Pennsylvania, ss.

being duly sworn according to law deposes and says that he is of the International Navigation Company petitioner above named, and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn and subscribed
before me, this
day of

I HEREBY CERTIFY that I have examined the foregoing petition and that in my opinion the same is well founded; and that the cause is one in which the prayers of the petitioners should be granted by the Court.

J. RODMAN PAUL,
of Counsel for the Appellant,
The International Navigation Co.

IN THE

Supreme Court of the United States.

Farr & Bailey Manufacturing Company,
Appellees,

v.

International Navigation Company,
Appellant.

In the matter of the petition of the International Navigation Company for a Writ of Certiorari directed to the Circuit Court of Appeals, for the Third Circuit.

BRIEF FOR PETITIONER.

The facts are sufficiently set forth in the Petition for Certiorari. That the four eminent judges who have had the case before them were evenly divided upon the question whether or not the case of the *Silvia*, 171 U. S., 462, can be fairly distinguished from the present case, would of itself seem to justify the petition. There is also the very important question whether a fault in the management of a vessel, because committed by those in charge *before* sailing, renders the owner liable notwithstanding the Harter Act; a point not yet settled by this Court. Until this Court shall speak further as to the true scope and meaning of the Harter Act there must be doubt and uncertainty arising from the present condition of the law in the Third Circuit.

Judge DALLAS in his opinion (Record, pp. 109 and 111) finds that the goods were stowed in such manner as to admit of free access being had to the port, and that when the vessel sailed the port hole "was probably closed. But be this as it may, certain it is that it was not securely fastened," and he concludes that by reason of this fact the vessel was unseaworthy at the time of sailing, and the owner thereby deprived of the exemption of Section 3 of the Act of July 1, 1893, known as the "Harter Act." In this opinion Judge ACHESON concurs; while Judge GRAY dissents, holding that "If the ship when she left port was not defective in structure or equipment, she was within every reasonable definition of the term seaworthy." And that the reasoning in the case of the *Silvia*, 171 U. S. 462, was on every point applicable and of binding authority, the facts being precisely similar.

Which view as to the meaning of the Harter Act and the applicability of the *Silvia* is to prevail?

I.

Seaworthiness Under the Harter Act.

The Act of July 1, 1893, Section 3, provides,

> "That if the owner of any vessel transporting merchandise * * * shall exercise due diligence to make the said vessel, in all respects, seaworthy and properly manned, equipped and supplied, neither the vessel, nor her owner * * * shall become or be held responsible for damages or loss resulting from fault or error in navigation *or in the management of said vessel.*"

It is fully conceded that the decisions of this Court in the cases of *The Delaware*, 161 U. S. 459; *The Carib Prince*, 170 U. S., 655, etc., hold that this Act has not modified the obligation of owners to furnish a seaworthy ship so far as structure, equipment and supplies are concerned; that this obligation is a warranty which cannot be discharged even by the exercise of due diligence on

the part of the owners. The cases above cited were those where *unseaworthiness in structure or equipment* was shown —*e. g.*, defects in rivets and bolts.

But in the present case it is not disputed that when the ship left port she was in all respects seaworthy in structure and equipment, properly manned and supplied. There was no defect in the matter of ports or deadlights; but the covers of one of the ports (easily accessible) were insufficiently fastened, and although able to resist the force of the sea for four or five days, eventually worked open and admitted the water. The insufficient fastening of the port covers was admittedly a fault in the management or use of the equipment, and not a defect of the equipment itself, and the persons guilty of this fault were shown to be not the shore servants of the owners, but those entrusted with the navigation and management of the ship while on her voyage, viz., the mates and the carpenter, themselves of course under the supervision of the master.

In cases of this kind, quite apart from the Harter Act, two distinctions are to be noted, viz.: (1) Between the agents employed by the owner on shore, for the proper construction and equipment of the vessel, and the agents employed for its management and navigation at sea and (2) between lack of proper equipment and misuse of proper equipment.

(1). As to agents—owners are absolutely bound by the acts of their shore agents, in respect of the structure and equipment of the vessel; the faults of these agents are the faults of the owner, and the Courts in such cases have been rightly loath to relieve ship owners in any degree from their strict warranty of seaworthiness. Quite different is the responsibility of owners for the acts of those charged with the management and navigation of the vessel—who may be called the owner's sea agents—

where the measure of liability for faults is not a strict warranty of faultlessness, but *due diligence in their selection.* A vessel must be properly manned as well as equipped, in order to be seaworthy, but the former obligation is complied with by the employment of a sufficient number of experienced navigators, officers and men who have been selected with due care. To these is confided the management of the ship's appliances, the pipes, valves, ports and hatches and other equipments, whether she be in port loading or discharging cargo, or at sea; and it would seem an arbitrary rule that fixes the moment of sailing as a fatal limit of time with respect to which acts of management performed prior thereto render the vessel unseaworthy, while the same acts performed by the same agents an instant after the moment of sailing have no such effect. Such, however, must be the result unless the owner, to fulfil his warranty of seaworthiness, is bound himself to go down into a compartment and with his own hands close and screw up the ports and batten the hatches or send a shore representative to do it. Antecedently of any Statute, one recognizes the propriety of a different degree of responsibility for the acts of *management* by sea agents, whether occurring *before* or after sailing, from that imposed for the acts of shore agents in constructing and equipping the ship. Now comes the Act of 1893, providing that if the owner shall exercise due diligence to make the vessel in all respects seaworthy and properly manned, he shall not be responsible for loss resulting from fault or error in the management of said vessel. What can be plainer than that the Statute was intended to relieve owners from the faults of management of their sea agents, *both before and after* leaving port. The authorities sustain this view.

In the *Glenochil*, 1896, Prob. p. 10, 15, President JEUNE in construing these words of the Statute said:

"I do not say whether navigation, in the strict sense of the term, is limited to the period during which the vessel is sailing, that is to say in motion, *but I see no reason for limiting the word 'management' to the period of the vessel being actually at sea.*"

In the same case GORELL BARNES, J., said (p. 19):

"It seems to me that all exceptions extend from the time that all the cargo was taken on board to the discharge, though the terms of the exemptions themselves may not cover there is nothing here to limit the time during which the word 'management' extends, and it seems to me it must extend, as the County Court Judge has said, up to the time that the cargo is finally delivered."

In the *Rotherfield*, 8 R. I. D., § M, pp. 102, 104, the Marseilles Tribunal of Commerce in construing an exception in an English bill of lading exonerating the ship owner from responsibility for the fault of pilots, officers and crew, in the "management or navigation of the ship," defined the word "management" as follows:

"It includes certain accessory operations, which without being properly called navigation, enter into the precautions to be taken for the benefit (interest) of the ship, either in *loading or discharging* the merchandise."

In *Carmichael & Co.* v. *The Association*, L. R., 19 Q. B D., p. 242, the failure to properly fasten the port or shutter which admittedly existed before sailing, was held by the Master of the Rolls to fall within the clause "improper navigation of the ship."

We by no means admit that in the present case the fault of management occurred prior to sailing. There is no direct evidence as to when the port covers were insufficiently fastened; but apart from this, in all such cases the "fault" has a double aspect—the act of commission before sailing, by which the port hole or other equipment is placed in an insecure condition, and the act of omission occurring after the vessel sails, in the failure to close or otherwise remedy the insecure condition. Thus in the case of the *Silvia*, already cited, the closing of the glass cover and leaving the iron one open

was a fault which occurred before sailing, while the failure to close the iron cover was a fault occurring after sailing. In our case there was the same failure to remedy the defect after sailing. So it is not essential to our position to prove that the authorities extend the word "management" to faults occurring before sailing.

See the *Sandfield*, 79 Fed. 371, where the sluices were left closed at sailing, the fault causing the damage as much as the failure to open them after sailing.

So in the *Mexican Prince*, 82 Fed., 484, it was the failure to close the valve before sailing as much as the failure to close it afterwards.

(2). Then there is the distinction between *lack* of proper equipment and mere *misuse* of the equipment: the failure to secure many parts of the ship which are in ordinary practice open from time to time, no doubt limiting the safety both of cargo and passengers, but not thereby rendering the vessel unseaworthy.

As Judge Gray in his dissenting opinion, says, (Record p. 115):

> "If properly equipped with hatch coverings and tarpaulins, it does not render a ship unseaworthy if they are left open or insecurely fastened. If they are, it is a fault of the navigation or management.
>
> "So, if a ship is properly equipped with anchors and the requisite tackle for stowing them, it does not render her unseaworthy if on leaving port the anchors are allowed to swing from the catheads, whereby there is danger of knocking a hole in the bows when the ship encounters head seas. It is a fault of the management and navigation to so leave them."

And he cites the case of *Headley* v. *Pinckney & Sons S. S. Co.* App. Cas. 1894, 222, also cited with approval by Mr. Justice GRAY of this Court in his opinion in the *Silvia*, 171 U. S., 465.

In that case, (*Headley* v. *Pinckney & Sons S. S. Co.*) a ship sailed with stanchions and rails on board, but not set up as they ought to have been. A storm coming on,

a seaman engaged in performing his duty fell overboard in consequence of the neglect to ship the stanchions and rails and was drowned. The House of Lords held that this was a neglect of duty but did not render the ship unseaworthy. After defining the word "seaworthy" and approving *Steele* v. *S. S. Co.*, 3 App. Cases, 72, LORD HERSCHELL said:

"After she left that port her hull and equipment remained precisely what they were at the time of her departure. She was in all respects efficiently equipped, *the fault was in not making use of the equipment with which she had been furnished.* * * * If any of the necessary appliances were lost or destroyed in the course of the voyage, it would no doubt be the duty of the master to use all reasonable means to supply others in their places just as it might be his duty during the voyage to restore the hull or machinery if damaged to a condition suited to the perils to be encountered; but if the appellant's argument were to prevail it would have a much wider scope than I am able to gather from the words of the enactment was intended by the Legislature.

"The failure properly to secure many parts of the ship which are in ordinary practice open, from time to time, would no doubt diminish the safety of those serving on board her, and be a source of danger to them; but I do not think it could reasonably be said that because in such a case a bolt was not securely fixed the vessel thereupon became unseaworthy."

See also the *Carron Park*, L. R. 15 Prob. Div., 203.

The *Mexican Prince*, 82 Fed. 484.

The *Sandfield*, 92 Fed. 663.

Bearing in mind the purpose of the Harter Act, can it be doubted that while not intended to modify the ship owner's strict warranty of seaworthiness in respect of structure and equipment (as decided in the *Delaware* and the *Carib Prince*, *supra*), it did intend to relieve the ship owner, provided he had furnished perfect structure and equipment and used due diligence in manning his ship, from acts of management on the part of his sea agents, whether occurring before or after sailing.

POOR COPY

II.

The applicability of the "Silvia" Case.

Judges McPherson and Gray declare that this case is ruled in favor of the petitioner by the *Silvia* case (171 U. S. 462); Judges Dallas and Acheson hold the contrary.

In the case of the *Silvia* cargo was injured by sea water which came through a port in one of the compartments of the between decks which at the time was only used for the storage of ropes and extra gearing. The entrance to the compartments was by a hatch which had been battened down, but which could be opened in two minutes. The port was furnished with a glass cover and with an extra cover of iron, and was eight or nine feet above the water when the vessel was deep laden. At the time of sailing only the glass cover was closed. Six or eight hours after getting out to sea rough weather was encountered, and water was discovered to be entering the engine room; an investigation showed that the glass cover was broken, and the water had entered the compartment in consequence. Whether the cover was broken by the force of the seas, or by floating timber, or a piece of wreckage, was wholly a matter of conjecture.

It was held by this Court that the ship was not unseaworthy by reason of beginning the voyage with the iron shutter left open, and the neglect to close it was a fault or error in navigation or in the management of the vessel within the meaning of section 3 of the Harter Act.

Mr. Justice Gray saying:

"But the contention that the *Silvia* was unseaworthy when she sailed from Mantanzas is unsupported by the facts. The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport. The port holes of the compartment in question were furnished both with the usual glass covers and with the usual iron shutters or deadlights; and there is nothing in the case to justify an inference that there was any defect in the

construction of either. When she began her voyage, the weather being fair, the glass covers only were shut, and the iron ones were left open for the purpose of lighting the compartment. Although the hatches were battened down, they could have been taken off in two minutes, and no cargo was stowed against the ports so as to prevent or embarrass access to them in case a change of weather should make it necessary or proper to close the iron shutters. Had the cargo been so stowed as to require much time and labor to shift or remove it in order to get at the ports, the fact that the iron shutters were left open at the beginning of the voyage might have rendered the ship unseaworthy. But as no cargo was so stowed, and the ports were in a place where these shutters would usually be left open for the admission of light, and could be speedily got at and closed if occasion should require, there is no ground for holding that the ship was unseaworthy at the time of sailing. *Steele* v. *State Line Steamship Co.*, 3 App. Cas., 72, 82, 90, 91; *Hedley* v. *Pinkney Steamship Co.* (1892), 1 Q. B., 58, 65, and (1894) App. Cas., 222, 227, 228; *Gilroy* v. *Price* (1893), App. Cas., 56, 64." * * * * *

"This case does not require a comprehensive definition of the words 'navigation' and 'management' of a vessel within the meaning of the act of Congress. They might not include stowage of cargo, not affecting the fitness of the ship to carry her cargo. But they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas; and if there was any neglect in not closing the iron covers of the ports, it was a fault or error in the navigation, or in the management of the ship. This view accords with the result of the English decisions upon the meaning of these words. *Good* v. *London Steamship Owners' Association*, L. R. 6 C. P., 563; *The Warkworth*, 9 Prob. Div. 20, 145; *Carmichael* v. *Liverpool Shipowners' Association*, 19 Q. B. D., 242; *Canada Shipping Co.* v. *British Shipowners' Association*, 23 Q. B. D., 342; *The Ferro* (1893), Prob. 38; *The Glenochil* (1896), Prob. 10."

Judge GRAY in the Court below (Record, p. 116) said:

"The reasoning in the case of the *Silvia*, 171 U. S. 462, however seems to me on every point applicable to the present case, and to be of binding authority on this Court, as it was considered to be by the learned Judge of the Court below. The facts in that case were precisely like those in the present case. The only difference being that in the *Silvia* the iron cover over the port was left open, while in the *Indiana* the glass cover was left open or insecurely fastened."

This view is sustained by analysis of the facts of the two cases. In both cases access to the ports was easy and unobstructed by cargo, thus fulfilling the test of physical

accessibility laid down in *Steele* v. *State Line S. S. Co.*, 3 App. Cases, 72, which has been followed in so many cases both in England and in this country, and finally approved by this Court in the case of the *Silvia*. In both, the owners had used due diligence in making the vessel generally seaworthy; in both the appurtenances of the port were of the same general size and character and structurally fit; in both the port in question was situated in the 'between' decks, or deck below the steerage in a compartment often occupied by passengers, but on the voyage in question not so occupied; in both cases access to the compartment was by a hatchway covered and battened down, but capable of being opened in an equal period of time. In the case of the *Silvia* the port was about eight feet above the water line, in our case about four and a half. In the case of the *Silvia*, the damage occurred six or eight hours after the vessel had left her dock, in our case not until four or five days had elapsed. The only difference between the two cases is, that in the case of the *Silvia* the iron cover was not closed, while in our case neither glass nor iron cover were sufficiently fastened.

If the *Silvia* is to be deemed seaworthy, why not the *Indiana?* Upon what fact is the Court prepared to distinguish one case from the other? The difference of two or three feet from the height of the water did not, or could not, affect the case; in fact, the *Indiana* went much longer without taking in water than did the *Silvia*. Failure to close the glass cover as well as the iron cover merely increases the degree of negligence, but does not alter the character of the act. In both cases, the proper appliances existed, the only fault was the failure to use them. The cases are alike in the only decisive and controlling circumstance, the *accessibility of the open or insufficiently protected port.* If the Court adopts any other test than this, where is the line to be drawn?

Judge DALLAS seeks a distinction between the two cases from the fact that in the *Silvia* the ports were usually and designedly left open for the admission of light, while in the *Indiana* they were supposed to be shut, and were not intended on that voyage to be left open or unfastened, and therefore concludes that the master could not be considered negligent or guilty of a fault of management in neglecting to shut or securely fasten a port hole which he supposed on sailing was properly fastened. In other words, the learned Judge holds that the ignorance of the master of the *Indiana*, that the port hole was open or insufficiently fastened, when the vessel sailed, rendered her unseaworthy, while his knowledge in the *Silvia* that the port was open prevented this result, although the physical conditions were similar. Is this a valid ground of distinction, which rests upon the knowledge or ignorance of the master at the time of sailing? In the first place, the master is not the only person, whose faults of management are covered by the Harter Act. The faults of the carpenter or second officer, or any member of the crew are equally within the purview of the Act, and it may well be argued that the person who actually left the port hole of the *Indiana* insecurely fastened, was aware or must legally be deemed aware of the fact at the time of sailing. But admitting that every soul on board was ignorant of the insecure fastening, does such ignorance render a vessel unseaworthy while under the same physical conditions but with knowledge of the fact, she would have been considered seaworthy. If to the rule of physical accessibility laid down in the case of *Steele* v. *The S. S. Co.*, *supra* (apparently approved by this Court in the *Silvia*), we are to add as the determining factor proof of the mental state of those in charge, we shall experience all the difficulties incident to the handling of psychical as distinguished

from physical facts. Memory is frail and defective, and conscious knowledge possessed at one moment may be lost the next. At what point of time must the knowledge be possessed to relieve the owner of unseaworthiness? And, if the knowledge is lost, that is, forgotten, will the burden of responsibility for unseaworthiness be instantly retransferred to the owner? One of the officers or crew may know of an open port an hour before sailing, he may forget the fact half an hour before sailing, or half an hour after sailing, and in either case the result is precisely the same as if he had never known, the damage is done. Yet if knowledge at the moment of sailing is the test, in one case the vessel was seaworthy and in the other she was not. There was knowledge in the case of the *Silvia*, but of what avail was it? Doubtless the uncovered ports were afterwards forgotten or the damage would have been prevented. The result is the same, whether the knowledge has been lost by forgetfulness or has never existed. It is respectfully submitted that this new modification of the rule of physical accessibility introduces difficulties and subtleties which will render it unacceptable to this Court.

The libellants have attempted to find further distinctions between the *Silvia* and the *Indiana*. They say:

1. That the port in the *Silvia* was much higher above the water line than that of the *Indiana*.

But, the difference was only about four feet, and the *Indiana* went five days without taking in water, while the *Silvia* went but half a day. The Court will hardly distinguish the cases on this ground.

2. That the compartments were of different character —that of the *Silvia* being a passenger hold, and that of the *Indiana* a cargo hold.

But it is undisputed that the compartments in the two cases were on precisely the same deck, viz., the between

decks, that both were covered with hatches battened down in precisely the same manner, and that in both access to the port holes was equally easy. In the *Indiana* it was the custom to carry passengers *frequently* in the compartment when the glass covers only were closed.*

3. That the glass cover being closed in the case of the *Silvia* afforded adequate protection against ordinary perils.

But the protection of the glass cover was *not* adequate on the voyage in question, and damage was done. So in the *Indiana* the fastening of both covers might be said to be sufficient for ordinary perils. There was negligence in both cases, the difference was one of degree, not of kind.

4. That in the *Silvia* the iron dummy was designedly left open to admit light, and it was the practice to leave it open.

When passengers were carried it was the practice also on the *Indiana*, and we concede that on the voyage in

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*Captain Shackford says (Record, p. 65):

"*Q.* Is that lower steerage used for cargo or passengers, or both?

"*A.* It is used for either.

"*Q.* What is the means of access from the upper deck to the upper steerage?

"*A.* By stairways and the hatch.

"*Q.* And from the upper steerage to the lower steerage?

"*A.* By stairways for the passengers and by taking off the hatch and putting an iron ladder alongside the hatch stanchions when there are no passengers."

And, on cross-examination.

"*XQ* Captain, do I understand that the hold is sometimes used for passengers?

"*A.* Yes, sir."

* * * * * *

On p. 66.

"*Q.* Berths had at times been placed in that hold?

"*A.* *Yes, we carry passengers there frequently.*"

question both covers were supposed to be closed, but the effect of knowledge and intention as a ruling factor in this class of cases has already been pointed out in the discussion of Judge DALLAS's views.

For the reasons stated the prayer of the petition should be granted, and the writ of Certiorari allowed.

J. RODMAN PAUL.
Of counsel for Libellant.

BIDDLE & WARD.
Proctors.

In the Supreme Court of the United States

OCTOBER TERM, 1900. No. 193.

THE INTERNATIONAL NAVIGATION COMPANY,
Appellant (*Respondent*),

vs.

THE FARR & BAILEY MANUFACTURING CO.,
Appellee (*Libellant*).

BRIEF FOR THE INTERNATIONAL NAVIGATION COMPANY, Petitioner and Appellant.

STATEMENT OF THE CASE.

This case comes before this Court on a writ of *certiorari* to the United States Circuit Court of Appeals for the Third Circuit. The action is a suit *in personam* in admiralty, originally brought in the United States District Court for the Eastern District of Pennsylvania by the Farr & Bailey Manufacturing Company against the International Navigation Company. The libel was filed on August 16th, 1895. The case was tried in that Court before the Honorable WILLIAM BUTLER, late Judge of the United States District Court for the Eastern District of Pennsylvania, who resigned the office of Judge before a decision was rendered; and afterwards the case was again tried or argued before the Honorable JOHN B.

McPherson, Judge of the said Court, and on April 28, 1899, an opinion was delivered sustaining the Libel and referring the cause to a Commissioner to determine the extent of the loss. (See opinion, Record p. 95.) Thereafter on May 5, 1899, the appellant having moved for a reargument of the cause, and the reargument having been granted, Judge McPherson again heard the case upon the questions raised by the motion for a reargument, and on June 22, 1899, filed an opinion reversing his former decision and dismissing the libel (see opinion, Record p. 99), and a decree was subsequently entered dismissing the Libel, with costs. (Record p. 102.) From this decree the Farr & Bailey Co. appealed to the United States Circuit Court of Appeals for the Third Circuit. The case was heard in that Court before the Honorable Judges Acheson, Dallas and Gray. By the decision of the Court of Appeals, filed November 28, 1899 (see opinions, Record p. 104, 107), a majority of the Court, to wit, Judges Acheson and Dallas, filed an opinion per Dallas, J., reversing the decree of the District Court and holding the appellant liable for the damage claimed; while Gray, J., filed a dissenting opinion to the effect that the decree in the Court below should be affirmed. Thereafter a petition for a writ of *certiorari* was filed in this Court by the respondent and appellant, which was granted.

STATEMENT OF FACTS.

The suit is one in admiralty for damages to cargo, to wit, certain bales of burlaps, laden on board the steamship *Indiana* by reason of sea water entering through a port hole of the steamship in the compartment in which the goods were stowed.

The appellant, the International Navigation Company, a corporation organized under the laws of the State

of New Jersey, is and was the owner of the steamship *Indiana*. In pursuance of a Bill of Lading, dated May 21, 1895, printed in full in the Record, p. 11, it was agreed by appellant to transport from Liverpool to Philadelphia upon said steamship and deliver unto the appellee, the Farr & Bailey Manufacturing Company, certain bales of burlaps therein mentioned. The Bill of Lading provided that the carrier should not be liable for loss occasioned by accidents of navigation of whatever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners or other servants of the ship owner, not resulting however in any case from want of due diligence by the owners of the ship or by unseaworthiness of the ship at the commencement or at any period of the voyage, provided all reasonable means had been taken to provide against such unseaworthiness; and the contract was in terms made subject to the law of England. The contract was further subject to the Act of Congress of February 13, 1893, commonly known as the "Harter Act."

The steamship *Indiana* left the port of Liverpool on May 22, 1895, fully manned, equipped and supplied; she was a staunch boat, without defects of structure or equipment, with a well chosen and competent crew of officers and men, and in all respects was generally seaworthy.

The bales of burlaps were received on board in good condition, and were stowed with other goods in compartment No. 3 of the lower steerage, or between-decks of the vessel (the deck just below the main or passenger deck) which was frequently used from time to time for the conveyance of passengers, when glass port covers only would be closed; there was but one tier of cargo two or three feet high covering the floor and access to the port holes, of which there were two on either side of the compartment, was easy and unobstructed. The

ports were of the usual character and dimensions, fitted, first with a glass window set in brass, over which could be screwed down an iron plate or covering, called a "dummy," both window and dummy being fastened by nuts and screws. All parts of the port covers were in perfect condition. Access to the between-decks compartment No. 3 was by a hatchway which was closed and battened down, but the hatch cover being in sections was capable of being opened in a few moments so as to permit a man to descend and pass to the port holes without delay or difficulty.

The ship's carpenter, the second and third officers, and two foremen stevedores, had inspected and examined the ports prior to sailing in accordance with the rules and regulations of the company, and had found them in proper order, and securely closed with the covers screwed down. The last of these witnesses left the compartment at 1.45 a. m. of the day upon which the vessel left her dock at 8 a. m. (Record p. 31, 36, 40, 49.) After the voyage began, during the first four or five days out, there were fresh breezes with the vessel rolling heavily at times, with occasional heavy swells and choppy head seas (Record p. 60) sufficient to submerge the port hole, but no water came in, as shown by the daily soundings taken. At the end of that period water was discovered through the soundings to be in the hold, and at 9 a. m. Tuesday, May 26th, the captain ordered the carpenter to go down into compartment No. 3, which he did, having no difficulty in throwing aside a section of the hatch, descending and crossing over the cargo to the port hole, which he found open, with water entering and wetting the cargo. He instantly closed and screwed fast the port and covers, without difficulty or delay. There was no imperfection or breakage of the port or of its equipment.

In the compartment the cargo did not reach within a foot or so of the lower rim of the port hole, and in no respect impeded the opening or shutting of the same. On the outside, taking the draft of the vessel fore and aft the lower rim of the port hole accurately measured was at a distance of four feet and a half an inch above the water level. (Record p. 58.) In the Courts below, it was claimed by the appellant that the port holes of compartment No. 3 having been admittedly inspected upon the day of sailing in accordance with the rules and regulations of the company, only three or four hours before the hatches were battened, and having been found properly closed and fastened both as to the glass cover and the iron cover, the port hole in question must have been opened by some one on board the ship after sailing or must have become forced open in some unknown manner after sailing, although originally properly fastened. Judge DALLAS finds in the Court below that although probably not open so that water could be admitted at the time of sailing, the port hole in question was insufficiently fastened, and afterwards was worked open by the action of the sea. There is no direct evidence as to how or why the port hole became open.

Upon the arrival of the steamship *Indiana*, and the discovery of the damage to the cargo, the libel *in personam* was filed, claiming damages in the sum of $2,084.15.

In the Courts below the questions raised and now brought for review before this Court are:

1. Was the *Indiana* seaworthy?

2. Was the damage to the cargo due to a fault or error in management of the vessel within the exemption of the Harter Act?

3. Is the case ruled by that of the *Silvia*, 171 U. S., 462?

ASSIGNMENTS OF ERROR.

The learned Court below erred:

1. In reversing the decree of the District Court.

2. In directing that a decree be entered adjudging the respondent to be liable for the damages complained of.

3. In sustaining the assignments of error filed by the libellant, appellant in the Court below.

4. In not finding that the steamship *Indiana* was in a seaworthy condition when she left Liverpool.

5. In finding that the damage to the cargo was caused not by an error in the management of the vessel, under the Act of Congress known as the Harter Act, but by unseaworthiness.

6. In not finding that the damage was caused by a fault or error in management.

7. In not finding that the case was ruled by that of the *Silvia*, 171 U. S., 462.

8. In not directing a decree to be entered in favor of respondent, appellant, dismissing the libel.

ARGUMENT.

The essential facts are not disputed and are thus found by the Courts below.

In the District Court the learned Judge finds:

> "In May, 1895, twenty bales of burlaps in good condition were received by the vessel in Liverpool consigned to the libellant in Philadelphia, and a bill of lading was given therefor. The bales were stowed, with some other goods, in compartment No. 3 of the lower steerage deck; but the compartment was not full, only one tier of cargo, two or three feet high, covering the floor, so that access to the ports was very easy and unobstructed. Four or five days after the vessel left Liverpool, water was discovered in the compartment; and when the hatches were opened, a

day or two later, it was found that the after port on the starboard side was admitting water freely as the vessel rolled. Both covers of the port were unfastened and open, but there was no sign of injury to either, or to the surroundings of the port. No severe weather had been encountered, and no accident was known to have happened to the vessel. The ports in the compartment were inspected the day before the vessel sailed, and were believed to be closed; but several hours elapsed between the time of inspection and the time of sailing. The libellant's burlaps were injured by the water thus taken into the ship, and the present suit has been brought to determine the respondent's liability." (First opinion, Record p. 95.)

"We have little difficulty in coming to the conclusion, that the vessel was a staunch boat, properly manned, equipped and supplied, and that she was in all respects fit for the voyage, except in the one respect of which the libellant complains—the condition of the after port on the starboard side in compartment No. 3." (Record p. 97.)

In the Circuit Court of Appeals Judge DALLAS finds:

"These goods were stowed in a compartment on the lower steerage deck in such manner as to admit of free access being had to the port through which the water subsequently entered. This port, and others similarly situated, were inspected on the day before the vessel sailed, and they were believed to be closed and properly fastened, but after the *Indiana* had proceeded for four or five days upon her voyage, water made its appearance in the compartment, and a day or two later investigation disclosed that both the glass cover and the iron dummy of the port in question were open, and that through this opening the water was admitted. There had been no severe weather, no accident was known to have happened, and the port, its covers, fastenings, and surroundings, did not appear to have been in any way broken or impaired."

(Record p. 104.)

As to the condition of the port hole at sailing:

"The impression made upon us by the evidence is, that it was probably closed, but be this as it may, certain it is that it is was not securely fastened, and we are of opinion that by reason of this fact the vessel was unseaworthy."
(Record p. 105.)

Certain minor details of fact will be noticed hereafter.

The question, therefore, raised by the *certiorari* is:

Was the *Indiana* unseaworthy at the time of beginning her voyage from Liverpool to Philadelphia, or was the failure to securely fasten the port covers and keep them fastened a fault or error in the management of the vessel under the exemption of the "Harter Act"? (Feb. 13, 1893, Statutes at Large 27, 445.) See Appendix hereto.

Judges DALLAS and ACHESON, of the Circuit Court of Appeals, held that the vessel was unseaworthy and the owners liable for the damage, Judge GRAY dissenting. The District Court (per MCPHERSON, J.) held (second opinion, Record p. 101) that the case was ruled by that of the *Silvia*, 171 U. S., 462, and that the condition of the port hole when the *Indiana* left Liverpool did not render the vessel unseaworthy, although himself inclined to a contrary opinion. Judge GRAY, in dissenting from the opinion of the majority of the Court of Appeals, not only concurred with Judge MCPHERSON in thinking that the reasoning in the case of the *Silvia* was "on every point applicable to the present case and to be of binding authority on this Court as it was considered to be by the learned judge of the Court below" (the facts being precisely alike, "the only difference being that in the *Silvia* the iron cover over the port was left open, while in the *Indiana* the glass cover was left open or insecurely fastened"), but also quite apart from the case of

the *Silvia* he considered that the owners were within the exemption of the third section of the Act of Congress known as the "Harter Act."

It is therefore proper to discuss, first, the bearing of the case of the *Silvia* above cited upon the present case; and, second, the broader question of the effect of the Harter Act, in cases like the present.

I.

The bearing of the case of the "Silvia," 171 U. S., 462 (1898), upon the present case.

1. The Case of the "Silvia."

In the case of the *Silvia* cargo was injured by sea water which came through a port in one of the compartments of the between-decks which at the time was used for the storage of ropes and extra gearing. The entrance to the compartment was by a hatch which had been battened down, but which could be opened in two minutes. The port was furnished with a glass cover and with an extra cover of iron, and was eight or nine feet above the water when the vessel was deep laden. At the time of sailing only the glass cover was closed. Six or eight hours after getting out to sea rough weather was encountered, and water was discovered to be entering the engine room; an investigation showed that the glass cover was broken, and the water had entered the compartment in consequence. Whether the cover was broken by the force of the seas, or by floating timber, or a piece of wreckage, was wholly a matter of conjecture.

It was held by this Court that the ship was not unseaworthy by reason of beginning the voyage with the iron shutter left open, and the neglect to close it was a fault or error in navigation or in the management of the vessel within the meaning of section 3 of the Harter Act

Mr. Justice GRAY saying:

"But the contention that the *Silvia* was unseaworthy when she sailed from Mantanzas is unsupported by the facts. The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport. The port holes of the compartment in question were furnished both with the usual glass covers and with the usual iron shutters or deadlights; and there is nothing in the case to justify an inference that there was any defect in the construction of either. When she began her voyage, the weather being fair, the glass covers only were shut, and the iron ones were left open for the purpose of lighting the compartment. Although the hatches were battened down, they could have been taken off in two minutes, and no cargo was stowed against the ports so as to prevent or embarrass access to them in case a change of weather should make it necessary or proper to close the iron shutters. Had the cargo been so stowed as to require much time and labor to shift or remove it in order to get at the ports, the fact that the iron shutters were left open at the beginning of the voyage might have rendered the ship unseaworthy. But as no cargo was so stowed, and the ports were in a place where these shutters would usually be left open for the admission of light, and could be speedily got at and closed if occasion should require, there is no gronnd for holding that the ship was unseaworthy at the time of sailing. *Steele* v. *State Line Steamship Co.*, 3 App. Cas., 72, 82, 90, 91; *Hedley* v. *Pinkney Steamship Co.* (1892), 1 Q. B., 58, 65, and (1894) App. Cas., 222, 227, 228; *Gilroy* v. *Price* (1893), App. Cas., 56, 64." * * * *

"This case does not require a comprehensive definition of the words 'navigation' and 'management' of a vessel within the meaning of the act of Congress. They might not include stowage of cargo, not affecting the fitness of the ship to carry her cargo. But they do include, at the least, the control, during the voyage, of everything with which the vessel is

equipped for the purpose of protecting her and her cargo against the inroad of the seas; and if there was any neglect in not closing the iron covers of the ports, it was a fault or error in the navigation, or in the management of the ship. This view accords with the result of the English decisions upon the meaning of these words. *Good* v. *London Steamship Owners' Association*, L. R. 6 C. P., 563: *The Warkworth*, 9 Prob. Div. 20, 145; *Carmichael* v. *Liverpool Shipowners' Association*, 19 Q. B. D., 242; *Canada Shipping Co.* v. *British Shipowners' Association*, 23 Q. B. D., 342; *The Ferro* (1893), Prob. 38; *The Glenochil* (1896), Prob. 10."

2. Similarity of the two cases.

This is clearly apparent from an analysis of the facts of the two cases. In both cases access to the ports was easy and unobstructed by cargo, thus fulfilling the test of physical accessibility laid down in *Steele* v. *State Line S. S. Co.*, 3 App. Cases, 72, which has been followed in so many cases, both in England and in this country, and finally approved by this Court in the case of the *Silvia*. In both, the owners had used due diligence in making the vessel generally seaworthy; in both the appurtenances of the port were of the same general size and character and structurally fit; in both the port in question was situated in the between decks, or deck below the steerage in a compartment often occupied by passengers, but on the voyage in question not so occupied; in both cases access to the compartment was by a hatchway covered and battened down, but capable of being opened in an equal period of time. In the case of the *Silvia*, the port was about eight feet above the water line, in our case four feet and half an inch. In the case of the *Silvia*, the damage occurred six or eight hours after the vessel had left her dock, in our case not until four or five days had elapsed. The only difference between the two cases

is, that in the case of the *Silvia* the iron cover was not closed, while in our case the Court below has found that both glass and iron covers while probably closed were insecurely fastened.

If the *Silvia* is to be deemed seaworthy, why not the *Indiana?* The failure to close the glass cover as well as the iron cover, may increase the degree of negligence, but does not alter the essential character of the act. As to the decisive point established as the main criterion by the authorities, viz., *physical accessibility*, the cases are *identical;* the port hole could be reached and closed in precisely the same time in each case. Upon what fact, or facts, then, is the Court asked to distinguish the case of the *Indiana* from that of the *Silvia?*

3. Views of the Lower Courts.

Judges McPherson and Gray hold that the cases cannot be fairly distinguished.

Says McPherson, J. (second opinion, Record p. 101):

> "Some of the cases cited by the respondent can be distinguished without difficulty, and some are not of binding authority; but I am unable to avoid the effect of the decision in the *Silvia*, 171 U. S., 462. I am afraid that I somewhat more than half shut my eyes to the facts of that case. They are strikingly like the facts in the present controversy, so like indeed, that I feel myself bound to accept the conclusions drawn from them by the Supreme Court. I obey the authority of that tribunal, therefore, and now hold that the condition of the port hole when the *Indiana* left Liverpool did not render the vessel unseaworthy."

Judge Gray, in the Court of Appeals, says:

> "The reasoning in the case of the *Silvia*, 171 U. S., 462, however, seems to me on every point applicable to the present case and to be of binding authority on this Court, as it was considered to be by the learned

judge of the Court below. The facts in that case were precisely like those in the present case, the only difference being that in the *Silvia* the iron cover over the port was left open, while in the *Indiana* the glass cover was left open or insecurely fastened."

Judge DALLAS, however, distinguishes the cases principally upon the ground that in the case of the *Silvia* it was known to the officers and crew that the port hole was insufficiently covered while in the case of the *Indiana* it was not known. He says (Record p. 106), after reciting the facts of the *Silvia:*

"But in the present case the port in question was not designedly left open, and its shutters ought not to have been left unfastened. They would not 'usually be left open for the admission of light' or for any purpose. They were believed by all concerned to have been securely closed, and that they would remain so throughout the voyage. It was neither intended nor expected that they would require or receive any attention at sea. It was not supposed that any control of them in the course of navigation and management would be necessary, and no duty to exercise control existed, simply because no need or occasion for it could have been foreseen or perceived. If, as in the *Silvia* case, the compartment in question had contained only tackle and stores, and if, as in that case, the glass cover had been closed, but the iron cover left open to admit light, it would unquestionably have been the duty of the master upon encountering rough weather to have had the iron cover closed; but he cannot be justly said to have committed either a fault or an error in omitting to remedy a defect of which he had no knowledge and for the existence of which he was in no way responsible."

4. The mental state of master and crew as a factor of seaworthiness.

(a) It appears, therefore, that the main, if not only

ground of distinction taken by Judge DALLAS is, that it *was known* in one case that the port hole was insufficiently protected, and it was *not known* in the other case.

Following the present case, a similar view has lately been expressed by Judge BROWN of the Southern District of New York, in the case of the *Manitoba*, 104 Fed., 145, saying:

> "There were, therefore, such easy means for closing the port within a reasonable time when necessary on the voyage, that if the officers had known it was open, I should not have felt at liberty, under the ruling in The *Silvia*, to regard the compartments as being in an unseaworthy condition on sailing, nor should I so hold except for their lack of information as to this fact. In the leading case of Steel *v.* State Line (3 App. Cas., 72) the leaky cargo port was about two feet only above the water line, and was covered up with grain in bulk, making access to it difficult; yet the case was sent back for a new trial, that a jury might find whether this constituted unseaworthiness or not. As respects ease of access to the port, that case was very different from the present."
>
> * * * * *
>
> "In that case (*Silvia*) the officers knew that the shutter was open; here they did not know that fact; and this, as stated below, is in my judgment an essential difference as respects seaworthiness of condition at the start. This, as I understand, was essentially the ground of the decision in Farr *v.* International, 98 Fed., 636."

Is this new criterion of seaworthiness one that commends itself to this Court?

Among the many preceding English cases, and in the case of the *Silvia* itself, there is no hint that the question of knowledge or ignorance of the open or insufficiently protected port was considered important.

Thus in the original case of *Steel* v. *Steamship Co.*, 3 App. Cas., 72, in the House of Lords (1895), no stress was laid upon the question whether those in charge of the vessel knew or did not know of the existence of the opening, and in sending the case back for trial this was not one of the questions referred to the jury. From the manner in which the grain had been piled up in front of the port hole in that case, it is clear the officers must have been ignorant of the fact that it was imperfectly fastened.

In *Carmichael* v. *The Association*, L. R. 19 Q. B. Div., (1887), p. 242, there was evidently no knowledge that the shutter had been insufficiently screwed down, yet it was held that the damage arose "from improper navigation of the ship."

In *Dobell* v. *S. S. Co.*, 1895, 2 Q. B. 408, 414, it was also clear that the condition of the port hole against which cargo had been piled up, was unknown to those in charge of the ship; yet it is the situation of the port with reference to the cargo, and its inaccessibility which were held to be the determining factors.

All these cases are cited by Mr. Justice GRAY in the *Silvia* case, apparently with approval, and the decision of that case is based mainly not upon the fact that those in charge of the vessel knew the iron cover was not closed, but on the physical accessibility of the port hole, thus: 171 U. S., p. 465.

> "Had the cargo been so stowed as to require much time and labor to shift or remove it, in order to get at the ports, the fact that the iron covers were left open at the beginning of the voyage might have rendered the ship unseaworthy."

(b) Again, whose knowledge or ignorance is to determine the question of seaworthiness—merely that of the Master (as Judge DALLAS seems to suppose), or that of all having to do with the port holes, or that of every one on board? If, as we understand it, ignorance creates

unseaworthiness because there is no one on board to correct the fault, or report the danger, and the open port or insecure fastening, although *physically accessible*, may be thus said to be *mentally obstructed*, so, also, the knowledge of *anyone* on board who might remove this mental obstacle in case of need, should render the vessel seaworthy. The inconvenience of probing the state of mind of all on board, in order to determine the question of seaworthiness, is sufficiently apparent, and the difficulty of obtaining truthful evidence on the subject not hard to foresee.

(c) Assuming, however, that every soul on board of the *Indiana* was ignorant of the insecure fastening, did such ignorance render the vessel unseaworthy, while under the same physical conditions, plus knowledge, she would be deemed seaworthy? It is submitted that a rule which seeks to ascertain the physical condition of the ship (seaworthiness or unseaworthiness) by evidence of the mental state of the officers and crew (knowledge or ignorance) is fraught with subtlety and difficulty. The duty of inspecting and closing the ports rests upon the same persons (second and third officers and carpenter) who are charged with the duty of inspecting and closing them while at sea. Memory is frail and defective, and the conscious knowledge of one moment may be lost the next—

"Out of mind as soon as out of sight."

At what point of time must the knowledge be possessed, and how long retained to relieve the owner of the burden of unseaworthiness? If the knowledge is lost, that is (to take the present case), the open or insecurely fastened port is *forgotten*, will that burden be instantly retransferred to the owner? To illustrate, the carpenter may know that the covers have been left open, or not securely fastened, half an hour before sailing; he may forget that fact half an hour after sailing, and continue for-

getful until the damage is done; is the vessel seaworthy because of his knowledge *at the moment of sailing?* Or, having knowledge prior to sailing he may have forgotten the fact at the moment of sailing, and afterwards remembered it again or not as the case may be; could it be said in either event that lack of conscious knowledge when the vessel sailed destroyed her seaworthiness? However these nice questions be decided, one thing is clear that the physical results are the same, whether the officers and crew have sailed in ignorance of the fault, or having known it, have forgotten it after the voyage has begun; the fault is not corrected, and the damage is done. In the case of the *Silvia*, when the threatening weather arose, of what avail was the knowledge of those on board as to the insecurely covered port hole? The result was the same as if there had been no knowledge, or (as may possibly have been the fact) it had been forgotten.

The difficulty of applying the test of knowledge or ignorance to cases of this kind, forms not the least of the objections to its adoption.

5. Other distinctions urged by Appellee.

(a) *The glass cover of the Silvia.*

It is said the glass cover was properly and tightly fastened, and was itself a sufficient protection against the influx of water.

But it turned out that it was no sufficient protection and that it was broken and submerged in weather that was not extraordinary. If the protection of this glass cover of itself rendered the *Silvia* seaworthy, surely the decision in the case would have been based upon this simple ground, both in the Lower Courts and in this Court. On the contrary it was assumed in all the Courts for the purposes of the decision that the omission to close

the glass cover, was negligence, and that the closing of the glass cover did not of itself render the vessel seaworthy. Said WALLACE, J., in the Court of Appeals, 68 Fed., 230:

> "Assuming however that they were not (that is, justified in supposing that there could not be any cause for apprehension from the port hole protected as it was by the glass cover) and that they were negligent in not putting on the iron cover, we think the case is controlled by the Act of Congress and that its provisions relieve the steamship from liability."

What proved to be the insufficient protection of the glass cover in the case of the *Silvia* gave way to the action of the sea a few hours after leaving not in an extraordinary storm, but in what is called by this Court (171 U. S., p. 464), "rough weather," while the insufficient fastening in the case of the *Indiana* availed to protect the cargo for four days in weather described as "heavy swell, choppy head sea," etc. (Record p. 60.) As above remarked, the negligence in one case may be greater than in the other, but the act *is essentially the same*, viz., a failure to properly use the appliances provided for the protection of the port hole against the influx of water.

(b) *The height of the port hole above the water line.*

It is said by appellee that the port hole on the *Indiana* was only two or three feet above the water line while that of the *Silvia* was eight or nine feet above. As a matter of fact, although the second officer, *Forbes*, speaking roughly, without measurement, stated that he should think the port must have been from two to four feet above the water (Record p. 53), the careful measurement by Mr. Ebsen, taking the draft of the *Indiana* upon leaving and upon arrival (as given by the log-book in evidence), and making the necessary corrections, found that on the day in question the bottom edge of the port light

was *four feet and half an inch* above the water level. (Record p. 57.)

This is not very important, nor has the precise distance of the port hole above the water line been considered a salient factor in the discussion of these cases. In the *Silvia* no allusion is made to the distance of the port hole above the water, in giving the reasons why she should be considered seaworthy. In the case of *Steele* v. *S. S. Co.*, *supra*, the port was only a foot above the water line, but this was not one of the questions referred by the Court to the jury, and in *Carmichael* v. *The Association*, L. R. 19 Q. B., 242, it was actually below the water line, yet the Court held the damage therefore to arise from improper navigation of the ship. In *Dobell* v. *S. S. Co.* L. R., 1895, 2 Q. B., 408, where free access to the port (which was frequently submerged) was prevented by cargo, Lord ESHER considers the fact of inaccessibility as of sole importance, not the height of the port hole. He says:

> "There was a port hole through which water could come. If that had been all and there had been the means of immediately closing the port hole the matter would have been otherwise. But here there were no facilities for closing the port hole, for it could only be closed after the removal of a considerable part of the cargo; so that if there were rough weather or a storm, the water would be coming in all the time until the port hole could be got at and closed."

A valid distinction might fairly be drawn between a port hole situated at a height rendering it liable to be submerged in *ordinary* weather, and one so situated as never to be submerged except in *extraordinary* weather. But where both ports, as in the cases of the *Silvia* and *Indiana* were covered by water in such weather as a vessel must encounter in every voyage, the difference of two

or three feet in their respective positions above the water line forms an insufficient basis for distinguishing the cases.

(c) *That the Silvia's ports were in a place where the shutters would usually be left open, while the Indiana's were not.*

This distinction is not based upon fact. In both cases either cargo or passengers were carried in the steerage or between-decks compartment in which the port holes were situated. If passengers were carried only the glass covers were fastened; if cargo, both glass and iron covers were fastened. In the case of the *Silvia*, during the voyage in question, ship's extra stores were carried in the compartment, but as the hatches were battened down, it was evidently not the intention of those on board to visit the compartment unless unexpected necessity should arise. In the *Indiana the port hole was in a compartment frequently and from time to time used for steerage passengers, and not in what the appellee calls a "cargo hold."*

Captain Shackford says (Record p. 63):

"Q. Is that lower steerage used for cargo or passengers, or both?

"A. It is used for either.

"Q. What is the means of access from the upper deck to the upper steerage?

"A. By stairways and the hatch.

"Q. And from the upper steerage to the lower steerage?

"A. By stairway for the passengers and by taking off the hatch and putting an iron ladder alongside the hatch stanchions when there are no passengers."

And, on cross-examination:

"XQ. Captain, do I understand that the hold is sometimes used for passengers?

"A Yes, sir."

* * * * * *

On p. 64.

"Q. Berths had at times been placed in that hold?

"A. *Yes, we carry passengers there frequently.*"

Dickson, the third officer, tells us that steerage passengers are carried in that compartment, and that it is never known until the last minute whether cargo or passengers are to be placed there. In stating why he made inspection particularly of these ports, he says (Record p. 89):

> "Not of the one, not of that one particular one, but of all the holds, all the steerages. For this reason on leaving Liverpool, the steerages sometimes we use them, the holds, for steerage passengers, and we are very particular about the steerage, because we can't say to the last minute whether they are going to use them for steerage passengers or not."
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> * * * * * *
>
> (p. 90.)
>
> "Q. You say you don't know until the last moment before leaving Liverpool?
>
> "A. Not the last moment—twenty-four or forty-eight hours—sometimes as late as six hours, that there is no cargo, and sometimes we use it for steerage passengers."

Forbes, the second officer, it is true, states (Record p. 54) that the compartment in question "Has always been filled with cargo during the time I have been on the ship." But, it does not appear how long he had been on the ship prior to this occurrence. There is, therefore, no contradiction whatever of Captain Shackford, who, as Marine Superintendent of the Line, and best qualified to know, says that the compartment in question had been used *frequently* for passengers, prior to the accident. We have, therefore, precisely as in the case

of the *Silvia*, a between-decks compartment, frequently used for passengers, and no more a cargo hold in the technical sense, than was the *Silvia's* similarly situated compartment.

(**d**) *That in the Indiana the compartment was a cargo hold, while in the Silvia it was not.*

As just shown, the compartment of the *Indiana* was no more exclusively used for cargo than that of the *Silvia*. Either might be used for cargo, or for passengers, and were in the same position in the ship. If the record of the *Silvia* is referred to it will be seen that her captain testified that the *Silvia's* compartment was used for cargo as well as for passengers precisely as was that of the *Indiana*. (*Silvia* Record, *Clark*, 12, 27.)

If it be meant that the use of the compartment for ship's stores in the cases of the *Silvia* and for cargo in the case of the *Indiana* upon the particular voyage, apart from the general use of the compartments, creates a distinction, why?

In both cases cargo was damaged.

The cargo in the *Indiana's* compartment presented no greater obstacle to reaching the port hole than did the ship's stores in the *Silvia's*. In neither case, apparently, was there the slightest danger, either of the stores or cargo, breaking or injuring the port hole from the inside.

(**e**) *The knowledge of those on the Silvia that the iron port was not closed.*

This distinction, the only one made by the Courts below, has already been discussed.

II.

Unseaworthiness and fault or error in management under the Harter Act.

( ) This Court in the *Carib Prince*, 170 U. S., 658 (1897), has decided that the ship owner is not relieved by

the exemptive terms of the Harter Act from the duty of furnishing a seaworthy vessel, where the unseaworthiness was due to a latent defect of structure, viz., the quality of the iron in a certain rivet. Mr. Justice WHITE said:

> "The exemption of the owners or charterers from loss resulting from 'faults or errors in navigation or in the management of the vessel' and for certain other designated causes in no way implies that because the owner is thus exempted when he has been duly diligent that thereby the law has also relieved him from the duty of furnishing a seaworthy vessel. The immunity from risks of a described character when due diligence has been used cannot be so extended as to cause the statute to say that the owner when he has been duly diligent is not only exempted in accordance with the tenor of the statute from the limited and designated risks which are named therein, but is also relieved as respects every claim of every other description, from the duty of furnishing a seaworthy ship."

We understand then that the warranty of unseaworthiness remains unimpaired since the Harter Act, in all that relates to the structure and equipment of the vessel. We do not understand that this Court has yet decided where loss has resulted directly from *fault or error in management*, that the ship owner is not relieved by the exemption of the third section, even though prior to the act the fault or error in management would have rendered the vessel technically unseaworthy; in other words, that *management* under the statute is to be restricted to the voyage after leaving port.

(**b**) Of course, the owner must have exercised due diligence, and in this regard there is no dispute in the present case. The *Indiana* was manned by competent officers. Captain Townsend, who died before he could be examined in the case, had been with the com-

pany for fourteen years and was an excellent commander. The chief officer had had thirty years' experience at sea and had been master of several ships; it was the same with the other officers, including the carpenter, who had been ten or fifteen years with the company, and had always performed his duty in a satisfactory manner. (Record, Shackford, p. 61, 62); the ports, deadlights and covers were all of proper type and construction, and were in good and perfect condition and repair.

As was said by Judge McPherson, in the District Court (Record, p. 97):

> "We have little difficulty in coming to the conclusion that the vessel was a staunch boat, properly manned, equipped and supplied, and that she was in all respects fit for the voyage except in the one respect of which the libellant complains," etc.

(c) That the leaving open or insecurely fastening the port covers was primarily a fault of management, is clear. The equipment was perfect; in its use, only there was fault or error. The same persons had supervision of the ports and deadlights, both before and after leaving (viz., the second and third officers and the carpenters), and their acts before and after, with respect to the ports or deadlights were essentially the same.

Long before the Harter Act the Courts established the distinction between the failure to supply proper structure and equipment and the misuse or nonuse of that equipment, which they called a fault of navigation or management, whether occurring before or after sailing. So, also, they distinguished between the strict warranty by which an owner is bound by every act of his agents concerned with furnishing structure and equipment, and the due diligence only required of him in the selection of those agents who are to man and navigate the vessel.

Thus as to the furnishing of proper structure and equipment and misuse or failure to use the same:

In *Headley* v. *Pinckney & Sons, S. S. Co.*, App. Cases 1894, 222, a ship sailed with stanchions and rails on board, but not set up as they ought to have been. A storm coming on, a seaman engaged in performing his duty, fell overboard, in consequence of the neglect to ship the stanchions and rails and was drowned. The House of Lords held that this was a neglect of duty, but did not render the ship unseaworthy. After defining the word "seaworthy" and approving *Steele* v. *S. S. Co.*, 3 App. Cases, 72, LORD HERSCHELL said:

> "After she left that port her hull and equipment remained precisely what they were at the time of her departure. She was in all respects efficiently equipped, *the fault was in not making use of the equipment with which she had been furnished.* * * * If any of the necessary appliances were lost or destroyed in the course of the voyage, it would no doubt be the duty of the master to use all reasonable means to supply others in their places just as it might be his duty during the voyage to restore the hull or machinery if damaged to a condition suited to the perils to be encountered; but if the appellant's argument were to prevail it would have a much wider scope than I am able to gather from the words of the enactment was intended by the Legislature.
>
> "The failure properly to secure many parts of the ship which are in ordinary practice open, from time to time, would no doubt diminish the safety of those serving on board her, and be a source of danger to them; but I do not think it could reasonably be said that because in such a case a bolt was not securely fixed the vessel thereupon became unseaworthy."

Judge GRAY in his dissenting opinion in the Court of Appeals cites with approval the case of *Headley* v. *Pinckney & Sons S. S. Co.*, and further says:

> "There is no suggestion that her equipment in the matter of ports or deadlights was defective. If

properly equipped with hatch coverings and tarpaulins, it does not render a ship unseaworthy, if they are left open or insecurely fastened. If they are, it is a fault of the navigation or management.

"So, if a ship is properly equipped with anchors and the requisite tackle for stowing them, it does not render her unseaworthy if on leaving port, the anchors are allowed to swing from the catheads, whereby there is danger of knocking a hole in the bows when the ship encounters head seas. It is a fault of the management and navigation to so leave them." (Record, p. 108.)

In the *Carron Park*, L. R., 15 Prob. Div., 203, a valve had been negligently left open by which while the vessel was still lying moored at her loading berth, water entered and damaged the cargo. It was *Held* that this did not render the vessel unseaworthy, HANNEN, P., saying:

"It did not render the vessel unseaworthy for the reception of this cargo which had already been loaded on board the vessel when in good condition. It is, for the purposes now under consideration, as though during the passage from New Fairwater, the valve had been negligently opened—that is, it was, as Lord Blackburn said, in *Steele* v. *State Line Steamship Company*, 3 App. Cas., 72, of leaving a port hole open at sea, negligence on the part of the crew, and not unseaworthiness of the ship."

In the *Mexican Prince*, 82 Fed., 484, JUDGE BROWN, of the District of New York (1897), laid down a similar rule. There damage to cargo arose from the failure to fit proper sounding pipes and from an obstruction to a certain valve. It was *Held* that the failure to use the equipment properly, was a fault in management. Said the Court (p. 488):

"The cause of the damage, therefore, was negligence in the use of the means of safety provided by the owners and a neglect to observe their written

orders in that regard, and not any omission by the owners to provide for all the requirements of a seaworthy ship, and to put her in seaworthy condition. In other words, the fault arose wholly in the 'management of the ship' at a port of call and subsequent thereto; it arose during the voyage, and not from anything the owners did or omitted to do, or any lack of diligence by them, to make the ship seaworthy at the commencement of the voyage. The third section of the Harter Act, therefore, exempts them from liability, so far as respects this negligence. The case of The Silvia, 64 Fed., 607; Id., 15 C. C. A., 362, 68 Fed., 230, is quite analogous in this regard."

In Carmichael v. *the Liverpool Association*, L. R., 19 Q. B. D., 242, during the loading of cargo an opening or port in the side of the vessel was insufficiently secured, so that during the voyage water leaked in. The Court held that this was damage arising from "improper navigation of the ship within the articles of association."

This case followed that of *Good* v. *the London Steamship Owners' Association*, L. R., 6 C. P., 563, where it was held that negligence in closing a cock which let in water to the injury of the cargo was "improper navigation of the ship."

In the *Silvia* these cases and others are cited with approval and as in accord with the ruling then made by this Court.

In several of these cases, therefore, the fault of management or navigation occurred before sailing: in some of them it occurred after sailing. Indeed, in most cases the omission to use properly the equipment furnished, has a double aspect; there is the omission to secure or properly fasten *before* sailing, as well as the failure to correct the fault *after* sailing. Thus in the *Silvia*, there was the fault of leaving open the iron shutter before, and the omission to close it after sailing.

In none of the cases can it be said that the commission of the fault was confined to the period while the vessel was at sea.

It clearly appears, therefore, that it is the *nature of the act*, not the time of its performance with respect to the sailing of the vessel, that determines whether it is a fault in management or not.

So *as to agents.* A vessel must be properly manned, as well as properly constructed and equipped, in order to be seaworthy; yet the owner's measure of responsibility in the selection of the agents to man the vessel is quite different from his absolute warranty of the acts of his agents in construction, equipment and stowage, the *shore agents*, as distinguished from the *sea agents.* In the case of the shore agents, a warranty of faultlessness is the measure of the owner's liability; in the case of the sea agents, merely due diligence in their selection. The employment of a sufficient number of experienced navigators, officers and men, selected with due care, renders the vessel seaworthy in this respect, although there may be fatal latent defects of intellect, memory and perception existing in those selected. See *Earnmoor* v. *Ins. Co.*, 44 Fed., 374, where an owner was exonerated from liability on account of a drunken pilot, having used due diligence in his selection.

Machlachlan on Shipping, 418.

Carver on Carriage by Sea, § 18.

These defects, however, unlike the hidden flaw of iron or steel in the rivet, do not render the owner liable. To these sea agents is confided the management of the ship's appliances, the pipes, valves, ports and hatches, and other equipment, whether she be in port, loading or discharging cargo, or at sea; and it would seem an arbitrary rule that fixes the moment of sailing as a fatal limit of time with respect to which prior acts of management render

the vessel unseaworthy, while the same acts performed an instant after the moment of sailing by the same agents have no such effect. Such must be the result unless the owner in fulfilment of his warranty of seaworthiness is bound himself to go down into the compartments and with his own hands close and screw up the ports, and batten the hatches, or send a shore representative to do it.

Antecedently of any statute, therefore, one recognizes that in respect of seaworthiness, the ship owner, while held to the strictest warranty in respect of structure and equipment, might with fairness be relieved, after exercising due diligence in selection, of responsibility for those acts of management, which are performed by agents whose faultlessness is not warranted by him, whether occurring before or after sailing.

(d) Then comes the Harter Act, providing in section 3 that if the owner shall exercise due diligence, he shall not "be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of said vessel."

In the *Silvia* (supra) Justice GRAY just touched without passing upon the question. He says (171 U. S., 466):

> "The case does not require a comprehensive definition of the words 'navigation' and 'management' of a vessel * * * but they do include at the least the control during the voyage of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas."

The exemption is not by the terms of the Act limited to the period of the voyage.

Moreover, if the word "management" is to be restricted to matters occurring during the actual voyage, it is difficult to see in what respect it enlarges the scope of the Act beyond that already given by the word

"navigation." The statute carefully distinguishes between the two words, and relieves the owners from faults or errors in navigation *or in the management* of the vessel, yet all acts of management occurring at sea are covered by the word "navigation."

Carmichael v. *Liverpool Association*, supra, 19 Q. B. D., 242.

Good v. *London Association*, L. R., 6 C. P., 563.

Canada v. *British Association*, 23 Q. B. D., 342.

Carver Carriage by the Sea, S. 26, Note Z.

That it was not the intent of the Statute to restrict faults of management to those occurring while the vessel was actually at sea (which would then have been also faults of navigation) has been decided by more than one Court.

In the *Glenochil*, 1896, Prob. p. 10, 15, President JEUNE in construing these words of the Statute said:

> "I do not say whether navigation, in the strict sense of the term, is limited to the period during which the vessel is sailing, that is to say in motion, *but I see no reason for limiting the word 'management' to the period of the vessel being actually at sea.*"

In the same case GORELL BARNES, J., said (p. 19):

> "It seems to me that all exceptions extend from the time that all the cargo was taken on board to the discharge, though the terms of the exemptions themselves may not cover there is nothing here to limit the time during which the word 'management' extends, and it seems to me it must extend, as the County Court Judge has said, up to the time that the cargo is finally delivered."

In the *Rotherfield*, 8 R. I. D., § M, pp. 102, 104, the Marseilles Tribunal of Commerce in construing an exception in an English bill of lading exonerating the ship owner from responsibility for the fault of pilots, officers and crew, in the "management or navigation of the ship," defined the word "management" as follows:

"It includes certain accessory operations, which without being properly called navigation, enter into the precautions to be taken for the benefit (interest) of the ship, either in *loading or discharging* the merchandise."

(e) It is said that by the proviso of section 3, the owner must use due diligence "to make the ship in all respects seaworthy" before he can avail himself of the exemption, and that such due diligence is not only to be exercised by himself, but by all his agents or servants, whether officers, crew or other persons. This is true where the act concerns the structure and equipment of the vessel, and not its use, or abuse. But to say that it applies to acts of management prior to sailing is merely another way of asserting that the word "management" under the statute is restricted to the period while the vessel is at sea, which is the very point in controversy.

As already pointed out, there is the clear distinction between the two classes of the owner's agents in regard to seaworthiness; the shore agents dealing with structure, equipment and stowage, are warranted faultless, the sea agents are merely selected with due diligence. The "due diligence" of the statute, therefore, in the case of shore agents means absolute responsibility for their acts; in the case of the sea agents who alone can commit "faults in the management" "due diligence" means proper care in their selection (which is not denied in this case), and thereafter there shall be exemption from responsibility for their acts of management. It is doubtful whether *Dobell* v. *Rossmore*, supra, can be reconciled to the later case of the *Glenochil*, *supra*, but in any event, the blocking up of the port hole in the former case introduced the element of bad stowage as distinguished from management, which distinguishes it from the present case.

III.

The decree of the Court below should be reversed, and the decree of the District Court dismissing the libel with costs be reinstated.

J. RODMAN PAUL,

Of Counsel for Appellant.

APPENDIX.

"THE HARTER ACT."

Act of February 13, 1893, 27 U. S. Statutes at Large, p. 445.

Chap. 105. An act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owners, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended

voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

SEC. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

No. 193
Br. of Cheyney & Lewis for Opp.
FILED
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JAMES H. MCKENNEY,

IN THE

Supreme Court of the United States.

Filed Feb 26th, 1900.

FARR & BAILEY MANUFACTURING COMPANY,
Appellees,

v.

THE INTERNATIONAL NAVIGATION COMPANY,
Appellants.

In re Petition for Writ of Certiorari.

Brief in Opposition to Petition.

HORACE L. CHEYNEY,
JOHN FREDERICK LEWIS,
Of Counsel for Appellees.

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Philadelphia.

22514

IN THE

Supreme Court of the United States.

FARR AND BAILEY MANUFACTURING COMPANY,
Appellees,

v.

INTERNATIONAL NAVIGATION COMPANY,
Appellant.

In the Matter of the Petition of the International Navigation Company for a writ of certiorari, directed to the Circuit Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF THE FARR AND BAILEY MANUFACTURING COMPANY, IN OPPOSITION TO THE PETITION.

This suit was brought to recover damages for injury to certain bales of burlaps while being carried on the steamship "Indiana" from Liverpool to Philadelphia.

The damage was caused by sea water entering through a port, which was found to be open, four or five days after the departure of the ship from Liverpool.

The learned judge of the District Court found as a fact "that the port in question was *either not fastened at all, or was insecurely fastened, when the vessel left Liverpool.*"

It is said in the opinion of the Court of Appeals, by DALLAS, J.:

"The impression made upon us by the evidence is that it was probably closed, but, be this as it may, certain it is that it was not securely fastened."

There is no foundation, therefore, to sustain the allegation in the seventh paragraph of the petition, that the District Court and the Court of Appeals found as a fact that the port, "although not open so that water could be admitted at the time of sailing, was insufficiently and insecurely fastened, and afterwards was worked open by the action of the sea."

Nor does the evidence warrant the allegation (page 3 of petitioners' brief) "that the port, although insufficiently fastened and although able to resist the force of the sea for four or five days, eventually worked open and admitted the water."

The evidence only shows that water was discovered in the hold at the end of four or five days, and that the port was then wide open.

Whether it was *open* at the time of sailing, was not shown, nor did it have any material bearing upon the question of the case, *i. e.*, whether the "Indiana" was unseaworthy in sailing from Liverpool with a port of a cargo hold, at least so insecurely fastened as not to prevent the influx of water.

The learned judge of the District Court held, in the first instance, that whether the port covers were not fastened at all, or were insecurely fastened, was immaterial; that in either event the ship was not seaworthy.

After a reargument, the learned judge reiterated his opinion that the vessel was actually unseaworthy, but deemed the facts in the case of the "Silvia," 171

U. S., 462, so similar as to be a binding authority upon the question of seaworthiness in this case, and bowing to what he understood to be the decision of this court, reversed his former finding and held that the vessel was not unseaworthy.

This court did not, in the "Silvia" case, pronounce any general rule of law as to seaworthiness, but held that the finding of the District Court and Circuit Court of Appeals of the seaworthiness of the vessel was correct, under the circumstances which the case presented.

After the appeal, counsel for the libellant had the opportunity of examining the record in the case of the "Silvia" and prepared and submitted to the Court of Appeals an analysis and comparison of the testimony in the two cases.

The majority of the Court of Appeals, having the assistance of this comparison of testimony, which the District Court lacked, came to the conclusion that there was such a wide difference between the facts of the cases, as to prevent the decision in the "Silvia" case from being binding in this case. The majority of the Court held that the "Indiana" was not in fact, seaworthy, thereby affirming the real opinion of the District Court. While in the dissenting opinion of Judge GRAY, it is said that the case of the "Silvia" is a binding one, yet the main ground of dissent appears to be that the owner complied with the provisions of the Harter Act by furnishing a ship not defective in structure or equipment, a point which will be referred to later.

Without burdening the court upon this preliminary application with the detailed comparison of the facts of these two cases, which was presented

to the Court of Appeals, the following summary will show such a wide difference in the two cases, as to fully warrant the conclusion of the Circuit Court of Appeals.

The facts in the case of the "Silvia" were as follows:

The "Silvia," with sugar in her lower hold, sailed from Matanzas for Philadelphia on the morning of February 16, 1894. The compartment between decks, next the forecastle, had been fitted up to carry steerage passengers, but on this voyage contained only spare sails and ropes, and a small quantity of stores. This compartment had four round ports on each side, which were about eight or nine feet above the water line when the vessel was deep laden. Each port was eight inches in diameter, furnished with a cover of glass five-eighths of an inch thick set in a brass frame, as well as with an inner cover or dummy of iron. When the ship sailed, the weather was fair, and the glass covers were tightly closed, but the iron covers were left open in order to light the compartment, should it become necessary to get anything from it, and the hatches were battened down, but could have been opened in two minutes by knocking out the wedges. In the afternoon of the day of sailing, the ship encountered rough weather, and the glass cover of one of the ports was broken—whether by the force of the seas or by floating timber or wreckage, was wholly a matter of conjecture—and the water came in through the port and damaged the sugar.

In the case of the "Indiana" the facts are as follows:

The compartment in which the burlaps were

carried was occasionally used for the carriage of steerage passengers, being known as No. 3, lower steerage, but on the voyage in question was used as a cargo compartment exclusively, containing the burlaps of the appellants and some other cargo. The port in question was eight or nine inches in diameter, furnished with a cover of glass set in a brass frame, as well as an inner cover, or dummy, of iron.

Both the iron and the glass covers were intended to be closed before the loading of any cargo. The second and third officers and the carpenter all testified that it was their respective duties, either to close both the glass and iron covers, or to see that they were closed, before any cargo was received, and that they were to be kept properly closed and fastened during the reception of the cargo and at the beginning of and during the voyage (Dixon, p. 86; Forbes, p. 51; Miller, 33). All of these officers were under the mistaken impression that both port covers were properly closed at the time the loading of the cargo was completed, and the hatches were battened down, with the officers under that impression, and with no intention on the part of any one to give any further attention to the port covers during the voyage.

The port in question was only two or three feet above the water line (Dixon, p. 88) and a very slight roll of the ship, in a moderate sea, was sufficient to submerge it and to permit the influx of water (Shackford, p. 65). A few days after the commencement of the voyage, and without any unusual weather having been experienced, the soundings indicated a leak, the hatches of this compartment were unbattened

and it was found that the port was open and that a large amount of water had been admitted to the compartment.

It will be seen, by a comparison of the facts in these two cases, that, although there are some similar circumstances in them, yet in the most important particulars they are absolutely different. Those which are most strikingly different are as follows:

FIRST.—In the "Silvia" case the glass cover was properly and tightly fastened, and the iron dummy only was left open, while in the present case both covers were left open, or improperly fastened, and there was absolutely nothing to prevent the inflow of water.

SECOND.—On the "Silvia" it was the practice to close the glass port cover only and to leave the dummy open for the purpose of admitting light to the compartment, should it be necessary to get any of the stores contained therein; while on the "Indiana" it was the practice to close both the glass port cover and the iron dummy, and it was the duty of at least three officers to see that both were properly fastened.

THIRD.—In the "Silvia" case the officers were aware that the iron dummy was not closed, as it was designedly left open for the purpose of admitting light, while in the present case the covers were unintentionally and negligently left open or unfastened and were supposed to be closed.

FOURTH.—In the case of the "Silvia" the glass port cover was sufficient protection against the influx of water, as the port was water tight, while in the case of the "Indiana" there was absolutely

nothing to prevent the influx of water, under ordinary conditions, the open port being only between two and three feet above the water line, in a position where it would be submerged by the first moderate sea.

FIFTH.—In the case of the "Silvia" the compartment was not used for cargo, but contained ship stores, while in the present case the compartment was used as a cargo hold exclusively.

The second ground upon which the petitioner relies is that set forth in the dissenting opinion of GRAY, J., in the Circuit Court of Appeals, as follows:

> "If the ship when she left port was not defective in *structure or equipment*, she was, within every reasonable definition of the term, seaworthy."

Or, as stated in the petitioners' brief, it is the difference between the *lack* of proper equipment and the *misuse* of it, by the crew of the vessel or other agents of the owner.

It is there contended that there is no liability for the misuse of proper equipment, either *before* or *after* the commencement of the voyage, because it is an error in "management," and that the Harter Act does not require "due diligence" on the part of what are there called the sea agents of the owner *to make the vessel seaworthy*, but merely requires "due diligence" on the part of the owner *in their selection.*

Although that question has never been directly passed upon by this court, it may be fairly said that the law is now well settled that the ship owner does not use "due diligence" to make the vessel seaworthy, within the meaning of Section 3 of the Harter Act, by merely furnishing proper equipment;

the law requires "due diligence" also on the part of his servants, in the use of the equipment, before the commencement of the voyage.

The question came before the Court of Appeals, in *Dobell* v. *Steamship Rossmore Co.*, L. R. (1895) 2 Q. B., 408.

The "Rossmore" left Baltimore with a port improperly caulked, through the negligence of the carpenter. Sea water entered through this port and damaged the cargo. She was admitted to be unseaworthy by reason of the condition of the port.

The Harter Act was included in the bill of lading, and the question arose whether the owners had exercised "due diligence," required by the Act, in personally furnishing a proper covering for the port and in employing competent servants. It was held that they had not, *as the Act required*, "*due diligence*" *on the part of the servants and agents of the owner, as well as on his part personally.*

The only decision suggesting a different view is that of Judge BROWN, of the Southern District of New York, in the "Silvia," 64 Fed., 608. He there says:

> "By the supply of proper ports, proper glasses and proper iron covers for the ports, as in the supply of proper hatch covers, the owner's duty of 'due diligence' was fulfilled, and if the officers of the ship, either at the moment of sailing or afterwards, omit to make use of the things supplied to put or keep the ship in a proper seaworthy condition for meeting the perils of the sea from time to time, such an omission seems to me purely a fault in the navigation or management of the vessel."

Since that decision, Judge BROWN has, however, himself changed his views and has repeatedly held

that the act requires due diligence on the part of the agents of the owner, as well as the owner himself. In other words, that it requires *due diligence in the work itself.*

The "Mary L. Peters," 68 Fed., 919;
The "Flamborough," 69 Fed., 470;
The "Alvena," 74 Fed., 252;
The "Colina," 82 Fed., 665.

Bearing in mind this principle, that the law requires "due diligence" to make the vessel seaworthy, not only on the part of the owner, but also on the part of his servants, it is manifest that the misuse of equipment may in some cases create unseaworthiness. Where the misuse occurs during the voyage, it is clearly an error in "management" and the ship is not liable.

The "Silvia," *supra.*

But where the misuse occurs *before* the commencement of the voyage, it may create initial unseaworthiness.

Seaworthiness means no more than that the vessel is in a certain condition.

As expressed by Mr. Justice GRAY, in the "Silvia," *supra*,

> "The test is whether the vessel *is reasonably fit to carry the cargo* which she has undertaken to transport. This is the commonly accepted definition of seaworthiness."

Whether the misuse of equipment before the commencement of the voyage creates unseaworthiness, depends entirely upon the resulting condition of the ship, i. e., whether it renders the ship unfit to carry the cargo.

But, while negligence in the use of equipment

before the commencement of the voyage *may* create unseaworthiness, it is frankly admitted that every failure to properly use it, before the ship breaks ground, does not create initial unseaworthiness. This is evident from the meaning of seaworthiness —fitness for the voyage. Obviously not every failure to use the proper appliances renders the vessel unfit. There are many parts of the ship which, in ordinary practice, are so used as not to be adequate for all occasions, yet whilst the safety of cargo may be diminished thereby, it cannot be fairly said that the ship is made unfit to carry the cargo.

Every vessel has some ports which in ordinary practice are left open, and although the failure to close them upon the approach of a storm, during the voyage, may be negligence, it certainly is not sufficient to make the vessel unseaworthy. If such a rule were applied, every vessel sailing the ocean would be unseaworthy.

The cases of hatch coverings and anchors referred to in the dissenting opinion of GRAY, J., clearly fall within this class, and would not create initial unseaworthiness.

Headley v. *Pinkney & Sons, S. S. Co.*, Appeal Cases (1894) 222, also falls into this class. In delivering the opinion, Lord Hershell said :

"The failure properly to secure many ports of the ship *which are, in ordinary practice, open from time to time*, would, no doubt, diminish the safety of those serving on board her, and be a source of danger to them ; but I do not think it could reasonably be said that because in such a case a bolt was not securely fixed, the vessel thereupon became unseaworthy."

It is unnecessary to seek further for an illustration of this class of cases than the "Silvia" itself. Mr. Justice GRAY says in the opinion (p. 465):

"The ports were in a place where these shutters *would usually be left open* for the admission of light."

How different are the facts of the present case. Not only was it not the practice to leave the port covers open, but being in a position where the port would probably be submerged in ordinary seas, common prudence required that not only the glass cover should be closed, but the iron dummy as well.

The importance of the careful closing and fastening of the port covers will be appreciated when it is remembered that there was imposed upon three different officers of the vessel, the duty of seeing that they were properly made fast.

The question in this case is one of fact; whether the steamship "Indiana" was in a seaworthy condition when she left Liverpool.

The port covers of a port, opening into a cargo hold, only two or three feet above the water line and likely to be submerged by the first moderate sea, were either open or insecurely fastened. They were not left open in ordinary practice, but were supposed by the officers to be properly closed; the hatches were battened down with them in that condition, and no one on board had the slightest intention of giving them the slightest care during the voyage.

That the vessel was not then seaworthy—that is, reasonably fit to carry the cargo—does not seem to admit of any doubt.

Nor does there appear to have been the great

conflict of opinion in the courts below upon this question of fact.

The learned Judge of District Court was clearly of opinion that the "Indiana" was unseaworthy, but yielded to what he deemed the binding decision in the case of the "Silvia." Entertaining so pronounced a view as to the unseaworthiness of the "Indiana," as his two opinions show, it may be safely said that if counsel had then had access to the record in the "Silvia" case, and could have presented to him the same analysis and comparison of the two cases which was afterwards presented to the Court of Appeals, that he would have reached the same conclusion as the majority of that Court, and have held that the facts in the "Silvia" case were so different that it was not a binding decision in this case.

The distinction between the two cases stated in the dissenting opinion of GRAY, J., viz., that in the "Silvia" the iron cover was left open, while in this case the glass cover was also open, is in itself sufficient to make the difference between seaworthiness and unseaworthiness. In the first instance the glass cover was sufficient to resist all ordinary seas, while in the latter there was not the slightest protection against even ordinary seas.

But it is submitted that it cannot be properly said that this was the *only* distinction, as stated in his dissenting opinion.

There were the additional circumstances, that in the "Silvia" the port was a considerable distance above the water; it was the practice to have the iron dummy open to admit light to the compartment;

it was left open intentionally; it was known by the officers to be open, &c., while in this case, the port was only two or three feet above the water line; it was the practice to close both the glass cover and the iron dummy; they were supposed to be properly closed and the hatches were battened down, with both covers insecurely fastened and with no thought on the part of the officers to give them any attention during the voyage.

Seaworthiness is a condition produced by a number of different circumstances, and its existence or non-existence can only be determined after a consideration of all the facts.

As said by Lord BLACKBURN in *Steele* v. *State Line S. S. Co.*, 3 App. Cases, 72:

"It will be a question, **taking the whole circumstances together**, was this ship reasonably fit to encounter the perils and was the damage that happened a consequence of her being unfit, if she was unfit. That question will have to be determined upon **the whole circumstances and the whole evidence.**"

It is submitted that a consideration of all the facts show beyond doubt that the "Indiana" was not seaworthy at the commencement of the voyage, as held by the Court of Appeals, and that a writ of certiorari, as prayed for by the petitioner, should be refused.

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JAMES H. MCKENNEY
Clerk.

IN THE

Filed Mar. 12, 1901.

Supreme Court of the United States.

October Term, 1900.

THE INTERNATIONAL NAVIGATION COMPANY,
Petitioner and Appellant (Respondent),

v.

FARR & BAILEY MANUFACTURING CO.,
Appellee (Libellant).

Brief for Appellee.

HORACE L. CHEYNEY,
JOHN FREDERICK LEWIS,
Of Counsel for Appellees.

722 Bourse Building,
Philadelphia.

COUNTER STATEMENT.

This action was brought by the Farr & Bailey Manufacturing Company, appellee against the International Navigation Company, appellant, owner of the steamship "Indiana," to recover the sum of $2084.15, for damage to twenty bales of burlaps, which were delivered to the Navigation Company, at Liverpool, England, May 21, 1895, on board its steamship "Indiana," in good order and condition, for carriage to the appellee, at Philadelphia.

Upon the arrival of the steamship at Philadelphia the burlaps were found to have been damaged by sea water.

The answer of the Navigation Company admitted the receipt of the burlaps at Liverpool, in good order and condition, and that some damage was done to them during the voyage, by sea water entering through a port hole, which became opened through some unknown cause or agency. Liability was denied for a number of reasons, which were set forth fully in the answer.

At the trial of the cause, however, the respondent defended solely upon the ground that it was excused from liability, by the provisions of the Act of Congress of February 13, 1893, commonly known as the "Harter Act."

The port through which the water entered was only *two or three feet above the water line* (Record, p. 88.), and a very slight roll of the ship, in a moderate sea, was sufficient to submerge it (Shackford, p. 65).

It was about nine inches in diameter and was fitted with a glass cover, opening *fore and aft*, on a hinge, and over that fitted a hinged iron cover or "dummy," opening *upward*. Both the glass cover and the dummy were provided with nuts and screws for the purpose of fastening them, and when properly fastened were water-tight.

A few days after the departure of the vessel from Liverpool, the soundings showed a leak, and when the hatch of the hold containing this cargo was opened, it was found that both the glass cover and the iron dummy were *wide open* and the water entering through the full bore of the open port.

The carpenter says (Rec. p. 35):

"When we got the cover off the hatch a deck hand who was assisting in doing so said *'I can see daylight down there.'* I said 'throw the hatch off' and I jumped down into the hold and found the after port on the starboard side *wide open* and the sea coming in the *full bore of the opening* and washing clean across the ship when she rolled."

The learned Judge of the District Court found as a fact:

"The port in question was *either not fastened at all, or was insecurely fastened* when the vessel left Liverpool. In either event it follows that the vessel was not seaworthy." (Rec. p. 100.)

He says in his first opinion (Record, p. 95):

"Both covers of the ports were unfastened or open, but there was no sign of injury to either or to the surroundings of the port. No severe weather had been encountered, and no accident was known to have happened to the vessel."

The same conclusion of fact was reached by the Court of Appeals. It is said in the opinion, by DALLAS, J.

"The impression made upon us by the evidence is that it was probably closed, but, be this as it may, *certain it is that it was not securely fastened.*"

Considering the fact that the port was found to be wide open by the carpenter, it would seem that the port covers were never closed. The iron dummy was hung vertically, being suspended on a hinge, at the top, and as it would fall down of its own weight, the carpenter's testimony that it was "wide open," admitting daylight, and that the water was "coming in the full bore" is equivalent to a statement that the iron port cover *was fastened up.*

It was argued by the respondent in the courts below, that the port covers were securely fastened at the time the ship sailed from Liverpool, and that they were improperly opened by some one during the voyage. The testimony gives no support to that argument, however, and this argument has now apparently been abandoned, and the correctness of the findings that the port covers were insecurely fastened at the commencement of the voyage, seems to be admitted.

Argument.

If the respondent is free from responsibility for the damage to these burlaps, that result has been brought about by the "Harter Act."

The third section provides:

"That if the owner of any vessel * * * shall exercise due diligence to make said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner, or owners, agents or charters, shall become or be held responsible for loss or damage resulting from faults or errors in navigation or in the management of said vessel."

The respondent claims the benefit of this provision alleging that the failure to properly secure the port covers, prior to the commencement of the voyage, or subsequently, although supposed to be properly closed, was a fault or error in the "management" of the vessel.

Three questions therefore arise in this case:

1. Was the "Indiana" seaworthy at the time she sailed from Liverpool?

2. If unseaworthy, had the respondent exercised "due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied?

3. Was respondent's failure to properly close and secure the port covers, either before, or during the voyage, an error or fault of "management" within the provisions of Sec. 3?

It will be observed that the third question can only arise in the event of an affirmative answer to the second, as the owner is by the terms of the third section, only relieved from faults or errors in the "management" of the vessel, when there has been the exercise of due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied.

Was the "Indiana" seaworthy at the commencement of the voyage?

Definition.

Mr. Justice GRAY says in delivering the opinion in the *Silvia*, 171 U. S., 462:

"The test of seaworthiness is whether the vessel *is reasonably fit to carry the cargo* which she has undertaken to transport. This is the commonly accepted definition of seaworthiness."

Lord BLACKBURN defined it similarly in the case of *Steel* v. *State Line Steamship Co.*, 3 Appeal Cases, 72.

Seaworthiness means "the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the Atlantic."

Judged by the above test, there can be no doubt but that the *Indiana* was actually unseaworthy when the voyage began; that is, unfit to carry the appellee's burlaps, in the compartment where they were stowed.

The conclusion of the Judge of the District Court, (in the very opinion in which he yields to what he deemed a binding decision of this court in the *Silvia*, 171 U. S., 462, is unanswerable.

He says in that opinion (Rec., p. 101):

"The result was unseaworthiness *because the vessel set sail with a hole in her side*, that was not only unknown to her officers, but was believed not to exist. *She was therefore not in a condition to afford due protection to the cargo in this particular compartment. If* the hole had been caused by a collision at her berth, and she had been sent upon her voyage without repair, it could not be succesfully asserted that she was seaworthy."

The Silvia Case.

It will be seen by consideration of the two opinions filed by the Judge of the District Court, that he entertained decided views as to the unseaworthiness of the vessel; but he was of the opinion, however, that the decision of this court in the *Silvia*, 171 U. S., 462, constrained him, notwithstanding his own views, to hold that the "Indiana" was seaworthy, when she sailed from Liverpool.

Judge GRAY, in his dissenting opinion in the Circuit Court of Appeals, was also of opinion that the decision in that case was binding in the present one, and it is upon that decision that the appellant's argument as to the seaworthiness of the "Indiana" is based, rather than upon any circumstances showing actual seaworthiness. Seaworthiness is a condition depending upon many circumstances.

Lord BLACKBURN in *Steele* v. *State Line S. S. Co.*, L. R. 3, App. Cases, 72, says:

"It will be a question, taking the whole circumstances together, was this ship reasonably fit to encounter the perils and was the damage that happened as a consequence of her being unfit if she was unfit. That question will have to be determined upon the whole cirumstances and the whole evidence.

It is obvious that this court did *not pronounce any general rule of law as to the seaworthiness of vessels, in the Silvia, but decided the case upon the facts alone.* The decision in that case is applicable to the present one, therefore, only if the facts of the two cases were so identical, as to produce a similar fitness or unfitness for the comtemplated voyages.

What were the facts of the two cases? Were they so identical as to compel the Court below to find that the "Indiana" was seaworthy?

In the case of the *Silvia*, the facts were as follows:

The *Silvia*, with sugar in her lower hold, sailed from Matanzas for Philadelphia on the morning of February 16, 1894. The compartment between decks, next the forecastle, had been fitted up to carry steerage passengers, but on this voyage contained only spare sails and ropes and a small quantity of stores. This compartment had four round ports on each side, which were about eight or nine feet above the water line, when the vessel was deep laden. Each port was eight inches in diameter, furnished with a cover of glass five-eights of an inch thick, set in a brass frame, as well as with an inner cover, or "dummy," of iron. When the ship sailed,

the weather was fair, and the glass covers were tightly closed, but the iron covers were left open in order to light the compartment, should it become necessary to get anything from it. In the afternoon of the day of sailing, the ship encountered rough weather, and the glass cover of one of the ports was broken—whether by the force of the seas or by floating timber or wreckage was wholly a matter of conjecture—and the water came in through the port and damaged the sugar.

In the present case the facts are as follows :

The compartment in which the burlaps were carried, on the voyage in question, was used exclusively as a cargo hold and contained the burlaps and some other cargo. The port was eight or nine inches in diameter, furnished with a cover of glass set in a brass frame, as well as an inner cover, or dummy, of iron. The dummy opened upward, while the glass cover opened horizontally,

Both the iron and the glass covers were intended to be closed before the loading of any cargo. The second and third officers, and the carpenter, testified that it was their respective duties, either to close both the glass and iron covers, or to see that the covers were closed, before any cargo was received. (Dixon, p. 86 ; Forbes, p51 ; Miller, 33.) All of these officers were under the impression that both port covers were properly closed at the time the loading of the cargo was completed. *The hatches were battened down, with the officers under that impression, and with no expectation on the part of any one to give any further attention to the port covers, during the voyage.*

The port in question was only two or three feet above the water line (Dixon, p. 88) and a very slight roll of the ship, in a moderate sea, was sufficient to submerge it and to permit the influx of water (Shackford, p. 65). A few days after the commencement of the voyage, and without any unusual weather having been experienced, the soundings indicated a leak, the hatches of this compartment were unbattened, and it was found that the port was wide open, indicat-

ing that the iron dummy must have been fastened up, and that a large amount of water had been admitted to the compartment.

It will be seen by a comparison of the facts in these two cases, that although there are some circumstances similar in each, yet *in the most important particulars, the cases are absolutely different.* Those which are most strikingly different are as follows:

1.—In the "Silvia" case the glass cover was properly and tightly fastened, and the iron dummy only left open. In the present case both covers were open, and there was absolutely nothing to prevent the inflow of water.

These facts are beyond dispute. In the opinion in the *Silvia*, Mr. Justice GRAY says:

"When the ship sailed, the weather was fair, and the glass covers were tightly closed, but the *iron covers were left open to admit light to the compartment should it be necessary to get anything from it.*"

In the present case the Judge of the District Court below finds as follows:

"We therefore find as a fact that the port in question was either not fastened at all, or was insecurely fastened, when the vessel left Liverpool."

And in the Circuit Court of Appeals it is said:

"Certain it is that it was not securely fastened."

As will be shown more fully hereafter, this distinction is most important.

The Circuit Court of Appeals in the *Silvia* case held (68 Fed., 231):

"In the state of weather during the first few hours of the voyage *there was no necessity for closing the ports with the iron covers*" and "*the glass covers * * * were adequate* for fair weather."

That ruling was affirmed by the Supreme Court.

Surely the conclusion that the *Silvia* was seaworthy in fair weather, with the glass cover only closed, is not adequate proof that the "Indiana" was also seaworthy, with a port entirely open, and in such a position that it was bound to be submerged by the first moderate sea.

In the former case there was *some* protection against the influx of sea water, which the court held adequate, while in this case *there was no protection whatever.*

2.—On the "Silvia" it was the practice to close the glass port only and to leave the dummy open for the purpose of admitting light to the compartment, should it be necessary to get any of the stores contained therein; while on the "Indiana" it was the practice to close both the glass port and the iron dummy, and it was the duty of at least three officers to see that both were properly fastened.

In support of this statement, the attention of the court is called to the uncontradicted testimony contained in the Record in the *Silvia* case.

CLARK, the master of the *Silvia*, testified (*Silvia* Record p. 12):

"*Q.* So far as your experience extends, has it been customary to close the shutters or leave the shutters open?

"*A.* When it is in a hold with cargo we usually shut them. If it is not, we don't. We consider the glass quite sufficient to keep out the water."

NICHOLSON, the mate of the *Silvia*, testified (*Silvia* Record, p. 29), that the iron shutters had never been closed while he was on the vessel.

"*Q.* What do you depend on to keep out the sea?

"*A.* The glass.

SHOTTEL, the carpenter of the *Silvia*, testified (*Silvia*, Record, p. 37):

"The shutters, as a rule, are always open."

This court expressly found that the port in the *Silvia* was one which it was customary to close with the glass cover only,

Mr. Justice GRAY says, in delivering the opinion of this court, at page 465:

"The ports were in a place where *these shutters would usually be left open* for the admission of light."

How different is the case of the "Indiana"! There is no question as to the practice upon that vessel.

DIXON, second officer, testified (Record, p. 86), that it was his duty to see that both the glass covers and iron dummies were closed and properly fastened. A similar duty was imposed upon the third officer (Record, p. 51), and it was the carpenter's duty to actually close them (Record, p. 33).

In the *Silvia*, the port was *eight or nine* feet above the water line, far beyond the reach of any ordinary sea, and did not open into a cargo compartment, and when closed with the glass cover alone was absolutely water-tight, while the the port of the "Indiana" opened directly into a cargo compartment, and was only *two or three* feet above the water line, and in a position where it would be submerged by any moderate sea.

3.—In the "Silvia" case, the officers were aware that the iron dummy was not closed, as it was designedly left open for the purpose of admitting light, while in the present case the officers were not aware the covers were open.

Mr. Justice GRAY, in delivering the opinion in the former case, so expressly finds (page 464).

"The glass covers were tightly closed, but *the iron covers were left open in order to light the compartment* should it become necessary to get anything from it."

In the Court of Appeals the ruling was similar. In delivering the opinion of the court, WALLACE, J., says (68 Fed., 230 at 231):

"The officers of the vessel regarded the glass covers as strong

enough to resist ordinary heavy seas, and seem to have left the *iron covers unclosed intentionally* upon the present voyage, in order that the compartment might be light in case it became necessary to visit it."

The master, of the *Silvia* said (*Silvia* Record p. 24):

"*Q.* No particular reason for leaving it (the iron shutter) open, was there?

"*A. Yes; we wanted to go down there at any time for stores, oil, lights and so on.*"

This is one of the most important facts in the *Silvia*. The Court of Appeals held that the vessel, with the glass cover closed, was seaworthy in ordinary weather, and that the failure, during the voyage, to close the iron dummy, *known to be open*, was a mere fault or error in the management of the vessel.

Upon the other hand, this record presents different facts:

LEACH, the stevedore of the *Indiana*, says (Record, p. 40):

"It is a rule of the service that the *deadlights and dummies are closed* by the ship's carpenter before the vessel begins to take cargo in, and after they have been closed they are not opened again under any circumstances."

DICKSON, second officer of the *Indiana*, says (Record p. 30):

"*Q.* What is your duty on shore with reference to the inspection of ports and deadlights?

A. My duty is to see that they are closed and secured before cargo is taken in the ship."

FORBES, the third officer, testifies (Record, p. 51), that it was his duty to survey the holds and examine the ports, and he further testifies (p. 53) that the master "*almost blamed me for having this thing happen.*"

4.—In the case of the "Silvia" the glass port cover was sufficient protection against the influx of water, as the port was made water tight, while in the case of the

"Indiana" with both covers open, there was absolutely nothing to prevent the influx of water under ordinary conditions, the open port being only two or three feet above the water line, and submerged in the first moderate sea.

The Court of Appeals held that the glass covers of the *Silvia* alone were adequate protection against ordinary weather. In delivering the opinion WALLACE, J., says at 231:

"In the state of the weather during the first few hours of the voyage there was no necessity for closing the ports with the iron covers, none even for closing them with the glass covers, and it can hardly be imagined that a storm would be encountered without premonitions affording ample time for access to the compartment and for fastening the iron covers."

This finding of the Court of Appeals was affirmed by this court. In delivering the opinion Mr. Justice GRAY says, at p. 465:

"But the contention that the *Silvia* was unseaworthy when she sailed from Matanzas *is unsupported by the facts.*"

The evidence fully justified that finding, as it was uncontradicted.

CLARK, the master of the *Silvia*, testified:

"*Q.* Are the glasses deemed sufficiently strong to resist the action of the sea?

A. Yes; we have ports in that vessel that have no shutters to them.

Q. Do you ever remember port lights to have broken from the force of the sea?

A. No." (*Silvia* Record, p. 12.)

NICHOLSON, the mate of the *Silvia*, testified as follows:

"*Q.* What has been the practice of the vessels you have been in as to protecting those glass ports by closing shutters inside of them? Has there been any practice of that kind?

A. We don't close the shutters at sea.

Q. What do you depend on to keep the sea out?

A. The glass.

Q. Did you ever know of any port being broken by the sea?

A. No.

Q. Did you ever hear of it?

A. No.

Both of the courts below have found in the case at bar, that the port covers were either insecurely fastened or not fastened at all when the "Indiana" left Liverpool. The port in question was only two or three feet above the water line.

DICKSON, the second officer of the "Indiana," so testifies (p. 88):

"*Q.* About how high above the surface of the water, when smooth, would be the port or dead light of No. 3 lower steerage when loaded?

A. I should judge between two and three feet.

Q. In weather such as you have had, if that port had been open, would the water have come in?

A. Yes, sir; water went three or four feet above it."

FORBES, the third officer of the "Indiana," testifies (p. 55):

"*A.* On this particular voyage I should think that port must have been from 2 to 4 feet above the water.

Q. What would be the effect of the rolling of the ship if that port was open as to water coming in or not?

A. The water would certainly come in if the port was open.

Q. Would it require a very great rolling in rough weather?

A. I should think not."

CAPTAIN SHACKFORD, Marine Superintendent of the International Navigation Company, the owner of the "Indiana," testifies (Record, p. 65) that a "very *moderate roll*," or a "very *moderate sea*," would be sufficient to submerge this port.

5.—In the case of the "Silvia" the compartment was not used for cargo, but contained ship stores, while in the present case the compartment was used as a cargo hold exclusively."

According to the finding of this court in the *Silvia* case, the compartment "contained only spare sails and ropes and a small quantity of stores." The manner in

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which the damage was caused in that case is described in the brief as follows :

"The steamship sailed from Matanzas in the early morning of the 16th. In the afternoon of the same day the engineer reported water coming through into the engine room (p. 9.), and after a search it was found that the water had come through a port hole or side port on the starboard side of the forward, or No. 1 between decks, had run aft through the wooden bulkhead which divides No. 1 from No. 2 between decks (p. 17) and rising above the coamings of the hatch, which are twelve or fifteen inches high (p. 17), had gone into No. 2 hold.

"No. 1 between decks had no cargo ; it contained only a few ropes and stores (p. 211)."

It is not denied in the present case that the port opened directly into the compartment containing the burlaps of the appellee.

It is asserted, however, in appellant's brief (p. 3) that the goods were stowed in "No. 3, lower steerage or between decks," which was "*frequently* used" for conveyance of passengers "when glass covers only would be closed." And on p. 20 of the appellant's brief this point is argued at some length.

The testimony there quoted is that of the marine superintendent of the line, but it is general in character, and must give way to the positive testimony of the third officer of the vessel.

The marine superintendent admits (Record, p. 65) that there are no permanent berths in this compartment, and that there was no method of communication with it except through the hatch, but that it had been sometimes used for steerage passengers, when temporary stairways were put in the hatch.

This testimony is general in its character, but that of Forbes, the third officer, is clear and explicit.

He testifies (page 57):

"*Q.* And is it (the orlop deck) on the "Indiana" used for carrying cargo entirely ?

A. Yes, sir."

In fact, this witness had never even heard this deck called the "lower steerage," the name now applied to it by the appellant. He testifies (p. 56) under examination in chief:

"Do you know whether it is ever called the lower steerage?

"*A. I never heard anyone call it so, because we had no passengers* there, consequently we never had any occasion to call it the lower steerage. *It has always been filled with cargo during the time I have been on the ship.*"

Objection is made to the testimony of this witness on the ground that it did not appear how long he had been upon the "Indiana," but it will be noticed that his testimony was taken in June, 1896, more than a year after the voyage in question. Presumably he was on the steamer for some time before, and his evidence establishes beyond contravention that this compartment was *not* "frequently used" for the carriage of passengers, as alleged in the appellant's brief.

The distinction is clear. In the "Silvia" the testimony shows that the compartment was used as a room for ship's stores.

In the "Indiana" the compartment was used for cargo exclusively, and there was not the slightest necessity or intention to open the hatches until the arrival of the ship at Philadelphia.

Certainly the foregoing differences in the facts of these cases, are too great to permit the decision in one upon *a question of fact*, to be a binding decision in the other.

The question in both cases is the same—was the vessel seaworthy at the beginning of the voyage?

Mr. Justice GRAY says in the *Silvia, supra* at page 403, that

"The test of seaworthiness is whether the vessel is *reasonably fit to carry the cargo* which she has undertaken to transport."

Judged by this standard, there can be no doubt in the present case.

The port through which the water entered the *Silvia* was water-tight until broken by an extraordinary sea. It was properly closed by the glass cover. It was eight or nine feet from the water line—so high that neither the water or floating wreckage could reach it under ordinary conditions. The officers intentionally left the dummy open to admit light. It was customary to leave it open, and there was ample opportunity to close it upon the approach of severe weather.

It was held that under such conditions, the "Silvia" was seaworthy *at the beginning of the voyage*, and that the failure to close the dummy *during* the voyage, upon the approach of a storm, was an error or fault in management, and therefore within the exceptions of the Harter Act.

In this case the port was entirely open at the beginning of the voyage, or came open because defective, and besides was inevitably bound to be submerged by the first heavy sea. It was supposed to be closed. The hatches were battened down with it open, and with no intention upon the part of any of the officers to give it attention during the voyage.

In the *Silvia* case, the testimony showed beyond question that the vessel was seaworthy with the glass port only closed, but where is there the testimony of a single witness that the "Indiana" was in a seaworthy condition, in sailing with an open port only two or three feet from the water line? Certainly, the officers of the vessel did not consider that she was seaworthy in that condition, as three of them testify to the duty imposed upon them to close it, and they also testify that they were under the impression that it was closed when the ship sailed from Liverpool.

This case must stand upon its own facts, and it is most earnestly argued, that the decision as to the seaworthiness of the *Silvia*, a *water-tight* vessel, does not determine this case where the vessel was not water-tight, but had an open port, only two or three feet above the water line, opening directly into a cargo hold.

In the *Manitoba*, 104 Fed. 145, Judge Brown of the

Southern District of New York, held that the ship was unseaworthy, in sailing with an insecurely fastened port, at the distance of 8 or 10 feet above the water line, while in the present case, the port was from 2 to 4 feet only from the the water line.

SECOND POINT.

The respondent did not "exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied."

The appellant argues (1) that the owner "exercises due diligence" by providing a vessel properly constructed and equipped; and (2) that while he is responsible for the misuse or non use of the structure or equipment by a "shore" agent, he exercises "due diligence" by the *selection of competent "sea" agents*, and that he is not responsible for *misuse or non use of the structure*, by the latter, even though it may produce *unseaworthiness* before the commencement of the voyage.

Judge GRAY in his dissenting opinion in the Circuit Court of Appeals, takes an amazingly advanced ground as to the degree of diligence required of the owner. He says:

"If the ship when she left port was not defective *in structure or equipment*, she was, within every reasonable definition of the term, seaworthy."

In other words, that if the owner provides a vessel properly constructed and equipped, he is absolved from all responsibility, no matter how unseaworthy the vessel *may actually be* at the commencement of the voyage, through the misuse of the equipment by the owner's servants. Even the appellant hesitates about going that far. It is admitted by the appellant (Brief p. 28) that there is a "warranty of faultlessness" as to the shore agents, in construction, equipment and stowage, but it is asserted that the only diligence required as to "sea" agents, is in selection, and that every act of a "sea" agent, relieves the owner, even if committed before the commencement of the voyage and though that it may produce actual initial unseaworthiness.

The ship owner does not "exercise due diligence" within the meaning of the Harter Act, by merely furnishing proper structure and equipment. The law requires "due diligence" to make the vessel seaworthy also on the part of all of his servants, in the use of the equipment, before sailing.

Reference to the Harter Act, shows clearly that the view of Judge GRAY is erroneous. The obligation there imposed, is not to furnish a vessel properly constructed and equipped alone. The owner's duty is to exercise due diligence to "properly (1) equip, (2) man, (3) provision and (4) outfit said vessel and (5) *to make said vessel seaworthy* (*i. e. fit*), *and* (6) *capable of performing her intended voyage.*"

As before stated, the appellant while taking the view of Judge GRAY in the court below, has *now* abandoned it, and attempts to make a distinction between the misuse of equipment by socalled "shore" agents and "sea" agents.

II.

Even if the reason for such a distinction were clear, the facts in this case do not support it. If the appellant's witnesses are to be credited, the misuse of the equipment was not by a "sea" agent but by a "shore" agent.

The second and third officers, and carpenter (so-called "sea" agents) testify that it was their duty to close the ports and that they performed this duty before any cargo was put into the compartment.

Leach—the foreman stevedore—(a "shore" agent) says that it was the duty of the carpenter to close the covers before any cargo was taken in, but that it was also his own duty to see that they were properly closed. (Rec., p. 40.)

According to the appellant's testimony, therefore, this duty was cast upon both "sea" and "shore" agents, and there is no definite evidence how the port covers became or were opened. The law recognises no such distinction between the agents, as the appellant now attempts to make.

It does not regard the *servant* employed by the owner "to make said vessel seaworthy and capable of perform-

ing her intended voyage." It is concerned only with the *character of the work done by the servant.*

Not only is there nothing in the Harter Act to support this refined distinction, made by appellant, between the responsibility for acts of "sea" and "shore" agents, but the facts of this case completely refute it.

It is said in appellant's brief (p. 28): "To these sea agents is confided the management of the ship's appliances, its pipes, valves, *ports*," etc.

Now, it is true that the officers of the vessel say that it was their duty to see that the ports were closed, before the reception of any cargo, but Leach, the appellant's foreman stevedore (a "shore" agent), says that it was his duty also to see that the ports were properly closed.

DONBAVAND testifies similarly, and that if the ports are found to require attention, it is the foreman's duty to notify the ship's officers (p. 45).

It is obvious that if any distinction can be made between these various acts, that the making of the ship seaworthy to receive cargo, no matter what use of appliances may be necessary, is essentially a "shore" act, and we therefore have, as the appellant's real argument, that there is no liability, although the ship was unseaworthy, because that unseaworthiness was the result of the negligence of a "sea" agent in performing a "shore" act.

III.

It may be fairly said that the law is now well settled that the ship owner does not use "due diligence" to make the vessel seaworthy within the meaning of the Harter Act, by merely furnishing proper equipment. It requires "due diligence" also on the part of his servants, in the use of the equipment *before the commencement of the voyage, and until it is actually commenced.*

The question came before the Court of Appeals, in England, in *Dobell* v. *Steamship Rossmore Co.*, L. R. (1895) 2 Q. B., 408.

The "Rossmore" left Baltimore with a port improperly caulked, through the negligence of the ship's carpenter (a sea agent). Sea water entered into this port and damaged the cargo. She was admitted to be unseaworthy by reason of the condition of the port.

The Harter Act was included in the bill of lading, and the question arose whether the owners had exercised "due dillgence," required by the Act, in personally furnishing a proper covering for the port and in employing competent servants. It was held that they had not, *as the Act required, "due diligence" on the part of the servants and agents of the owner, as well as on his part personally.*

The only decision suggesting a different view is that of Judge BROWN, of the Southern District of New York, in the *Silvia*, 64 Fed., 608.

Since that decision, Judge BROWN has, however, himself changed his views, and has repeatedly held that the Act requires due diligence on the part of the agents of the owner, as well as the owner himself. In other words, that it requires *due diligence in the work itself.*

The Mary L. Peters, 68 Fed., 919;
The Flamborough, 69 Fed., 470;
The Alvena, 74 Fed., 252;
The Colina, 82 Fed., 665;
The Manitoba, 104 Fed.

THIRD POINT.

The failure to close the port covers was not an error in "navigation, or in the management of the vessel."

1.

The appellant contends that everything done by the "sea" agent is "management" and within the terms of the Harter Act, even if that thing is done before the vessel sails and renders it actually unseaworthy.

If the word "management" stood alone, there might be some force in that argument, but it must be remembered that the Act relieves the owner from liability for "faults or errors in management," only when he has exercised "due

diligence" to make the said vessel (1) *in all respects seaworthy*, and (2) properly manned, (3) equipped, and (4) supplied.

This section does not make any refined distinction between unseaworthiness produced by the negligence of a "sea" agent through the misuse of equipment, and that of the shore agent. It provides, in unmistakable language, that due diligence must be used to make her seaworthy in *all respects*, in addition to the equipment.

From the plain language of the statute, it is manifest that the owner, in order to relieve himself of liability on account of error or fault in "management," must show a condition precedent; that is, either seaworthiness or the exercise of due diligence to make the ship seaworthy, and the burden is upon the owner to show the exercise of due diligence.

The Friesland, 104 Fed. 99.
The Manitoba, 104 Fed. 145.

Is is equally clear that as seaworthiness at the commencement of the voyage, is a condition precedent to the defence of a fault in management, the latter defence can have no application save where the fault complained of, follows the time fixed for seaworthiness, that is, the commencement of the voyage. In other words, is is only errors or faults of management *during the voyage* which excuse the owner.

That is clearly stated in the opinion of this court in the "Silvia," 107 U. S., 462. It is there said:

"The case does not require a comprehensive definition of the word 'navigation' and 'management' of a vessel, * * * but they do include at least the control *during the voyage* of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the sea."

This point seems well settled.

Dobell v. *S. S. Rossmore*, L. R. 1895, 2 Q. B. 408.
The Mexican Prince, 82 Fed. 484.

Judge BROWN, in his opinion, in the latter case, says:

"In other words, the fault arose wholly in the 'management of the ship' at a port of call and subsequent thereto; *it arose during the*

voyage, and not from anything the owners did or omitted to do, or any lack of diligence by them, to make the ship seaworthy, *at the commencement of the voyage*."

This point seems to be considered so well settled, by the profession, that in the *Manitoba*, 104 Fed. 145, a case almost identical with the present one, there is not the slightest reference to it in the elaborate opinion of Judge BROWN. It does not seem to have been raised at all.

2.

Furthermore, the argument that the Harter Act exempts the owners from liability for faults in "management," both *before* sailing and *during* the voyage, is but the restatement, in a new form, of the preceding proposition, which the courts have repudiated, *i. e.*, that the owner uses "due diligence" by properly manning and equipping the ship, and is not responsible for the lack of "due diligence" on the part of servants he employs to make it seaworthy.

The appellant contends that the failure of the officers and crew to properly use the equipment, both *before* sailing and *during the voyage*, is an error in "management" alone. It will be noticed that this is the *whole time during which there is occasion to make use of the equipment.* It is equivalent to saying that *every* act of neglect to properly use the equipment is an error in "management." Such an argument leaves no room whatever for the application of the preceding principle, that the Act requires "due diligence" on the part of the servants of the owner to so use the appliances, which the owner has supplied, as to make the vessel actually seaworthy, as well as on the part of the owner personally to furnish the proper equipment.

The argument that "management" includes faults in the use of equipment both *before sailing* and *during the voyage*, is in effect an argument that the Act exempts the ship owner from *every act of negligence* of the officers or crew, either in the use of the vessel as a whole, or of its equipment.

Whether any act of negligence is an error in "management" depends entirely upon the result produced.

Seaworthiness is a condition only, and initial unseaworthiness is *almost invariably the result of negligence*. The only exception is that of latent defect—in a shaft, for instance. If the negligence of the crew makes the vessel unfit to start on the voyage, such negligence is not an error in "management," but the vessel is unseaworthy, and the Harter Act has no application.

3.

It having been shown that the failure to use proper equipment *during* the voyage is an error in "management" only, the sole question remaining is the effect of negligence in the use of equipment *before* sailing.

It has been shown already that it *may* create unseaworthiness, but it is frankly admitted by appellee, that every failure to properly use the equipment, before the ship breaks ground, does not create initial unseaworthiness. This is evident from the meaning of seaworthiness — fitness for the voyage. Obviously not every failure to use the proper appliances renders the vessel unfitted.

Every vessel has some ports which in ordinary practice are left open, and although the failure to close them upon the approach of a storm, during the voyage, may be negligence, it certainly is not sufficient to make the vessel unseaworthy in reality. If such a rule were applied every vessel sailing the ocean would be unseaworthy.

The illustrations given in the dissenting opinion of Judge GRAY fall within this class. But there is a clear distinction between them, and an insecurely fastened or open port hole, within a few feet of the water line. In the latter case the ship is at once made unseaworthy, while in the cases cited by Judge GRAY, only unusual conditions could render the ship unseaworthy. The distinction is pointed out by Lord HERSCHEL, in the case of *Hedley* v. *Pinkney & Sons S. S. Co.*, *supra*. He follows *Steel* v. *S. S. Co.*, *supra*, saying that "the failure

properly to secure many ports of the ship *which are in ordinary practice open, from time to time,*" does not create unseaworthiness.

The same ruling was followed in the *Silvia, supra.* In delivering the opinion Mr. Justice GRAY says:

"As the ports were in a place where the shutters would usually be left open for the admission of light, and could be speedily got at and closed if occasion should require, there is no ground for holding that the ship was unseaworthy at the time of sailing."

In the present case not only were the covers not ordinarily left open, but also the duty to close them was imposed upon four different persons, all of whom thought the covers were actually closed and properly fastened.

The appellant refers to a number of authorities in support of the argument, that the "faults of management" are not only those committed *during* the voyage, but prior thereto.

The only American case referred to is the *Mexican Prince*, 82 Fed. 484.

Why this case should be cited in support of that argument is beyond comprehension, as Judge BROWN'S decision is directly contrary to it.

In that case, the damage was caused by the neglect to test a certain valve, before attempting to remove the water ballast *during the voyage.*

Judge BROWN, in his opinion expressly says:

"In other words, the fault arose wholly in the 'management of the ship' at a port of call and subsequent thereto; *it arose during the the voyage,* and not from anything the owners did or omitted to do, or any lack of diligence by them, *to make the ship seaworthy at the commencement of the voyage.*

The other authorities cited are English decisions as follows:

Carmichael v. *Liverpool Assn.* 19 Q. B., 242;
Good v. *London Assn.*, L. R., 6 Q. B., 563;
Canada v. *British Assn.*, 23 Q. B., 342;
The Glenochil, (1896) Prob. 10.

In the *Manitoba, supra,* Judge BROWN says in referring to these cases, that they give a construction to the phrase "improper navigation," which seems "*too broad in construction to fit the phrases of the Harter Act*" (p. 155.)

The cases of *Good v. London Steamship Owners' Association,* supra, *Canada Shipping Company* v. *Protective Association* and *Carmichael v. Liverpool Sailing Ship Owners' Mutual Indemnity Association,* are quite similar, and the latter case may be used as an illustration.

It was a suit by the owners of the Ship *Argo* against an association of ship owners which had agreed to indemnify each other against loss or damage to goods or merchandise "caused by improper navigation of the ship carrying the goods or merchandise." From its very nature, the "navigation" contemplated, implied *continuous use* by the officers and crew.

It was held that the damage caused by water coming through an insufficiently secured port, was "improper navigation," against which the ship owner was indemnified by the articles of association.

Attention is particularly directed to the language of the judges who delivered the opinions.

SMITH says:

"The cases cited as the meaning of the word navigation in bills of lading are of no authority, and do not assist us at all in determining in what way we ought to construe the word 'navigation' in in this case."

WILLS said:

"In this case there is, I think, singularly little to be gathered by way of illustration from the cases. With regard to cases dealing with *bills of lading, the words which we have to construe are, in the generality of cases, found in connection with a number of other words which have such a large effect in limiting or extending their meaning that we can gather but little from them as to the construction of the words, when standing, as they do here, by themselves.*"

It will be observed that in those cases the decisions were

limited to the words "improper navigation" when standing *alone*.

There is a clear distinction between them and the present case.

The Harter Act does not, in every case, relieve the ship owner from liability for faults of navigation or management. It frees him only where the ship is seaworthy; or where there has been the exercise of due diligence to make it so. Under the articles of association in the above cases, the owner was indemnified against every act of improper navigation, whether before the voyage, and causing initial unseaworthiness, or during the voyage. Under the Harter Act, relief is given only where the mismanagement does not create initial unseaworthiness.

The *Glenochil, supra*, throws no light on this case. There the ship was *admittedly seaworthy when she sailed* from New Orleans, but there was improper management at the port of discharge, after a considerable portion of the cargo had been unloaded. This was held to be a fault in management under the Harter Act, which was included in the bill of lading. Whether the decision would be followed here is not material for consideration. It is sufficient for the purpose of this argument to show that the owner is not in a position to claim exemption, because his ship was actually unseaworthy at the beginning of the voyage.

The appellant's servants did not exercise due diligence to make the Indiana seaworthy.

The appellant's witnesses show that no attention was given to the ports by any one, at any time after the loading of cargo commenced.

MILLER, the carpenter, testifies (Record, p. 34) that, in company with the marine superintendent of the line at Liverpool, he examined all the ports *on the afternoon of the day before the vessel sailed*, and *before any cargo had been placed in the compartment*, and that they were then all right. His testimony does not show that he made any later examination.

FORBES' (the third officer) testimony is inconsistent with that of the carpenter. He says that the vessel sailed at about 5 o'clock in the morning, and, that *he and the carpenter*, in the early part of the same day made an examination of the ports, and that they were then all right. (Record, p. 52.) If he made an examination at all with the carpenter, he is manifestly in error as to the time.

DICKSON, the second officer, has still another story. He says that it was his duty to see that the ports were properly closed (Record, p. 86) and that *thirty hours before the departure of the vessel*, "I saw they were all secure and all bolted and everything, that is with the carpenter."

Two witnesses testified upon this point.

LEECH, foreman stevedore, says (Record, p. 40), *that he noticed the ports on the day before the vessel sailed* and that they were then closed and the dummies fastened and screwed down tight.

He says that he left the hold about 11 P. M. of the day before the ship sailed. (Rec. 39).

DONBAVAND, another stevedore, testifies that he observed the dead lights in No. 3 lower steerage, and that they were all closed and screwed up, with the dummy covers down and screwed tight, (Record p. 44.) He says that he left the hold about 1.45 A. M. on May 22. As Leech, the foreman stevedore, left at 11 P. M., Donbavand must have left at the same time.

No further attention appears to have been given to them at all, (Rec. 39.)

KELLY, a "shore" carpenter, says that he went on board at 6 A. M. on May 22nd, and went to batten down the hatches of No. 3 hold, and that before battening them down he lifted them and looked down to see if there was any vacant space for baggage. He says positively that he was not in the hold and did not observe the deadlights (p. 48.) He *assumes* that the port was closed, because he saw no light, but the port in question was next the wharf (Record, p. 85), and no light could get in anyhow.

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In the *Manitoba*, 104 Fed. 145, Judge BROWN argues with much force, that such conduct by the crew or stevedores, was not only a failure to exercise due diligence, but that it was a "failure in the proper care and stowage," within the first section of the Harter Act.

FOURTH POINT.

The mental state of master and crew as a factor of seaworthiness.

This appears to be one of the main points in the appellant's brief, and it is argued at some length that the facts that the iron dummy on the *Silvia* was known to be open, but that the officers of the "Indiana" did not know both her port covers were open, but supposed them shut, make no difference.

This point is fully considered in the second opinion of Judge MCPHERSON in the District Court, and in the opinion of Judge DALLAS in the Circuit Court of Appeals. It is likewise fully considered by Judge BROWN, in the *Manitoba*. 104 Fed. 145.

Little can be added to what they have said.

The appellant's argument is erroneous, because based upon misconception of what has been decided in the courts below.

It has not been held that unseaworthiness is converted into seaworthiness by a knowledge of that unseaworthiness on the part of the officer of the vessel, or as the appellant states it: unseaworthiness plus knowledge, does not make seaworthiness, nor has it been so contended or decided.

Seaworthiness is a condition, produced by many circumstances.

There can be no single test for it, but the question always is, whether the ship is in fit condition to encounter the ordinary perils of the voyage.

The appellant argued in the court below that, accessibility of the port was the sole test, and even here it is intimated that it is the principal test. This argument is based upon a misunderstanding of the decision of Lord BLACKBURN, in *Steele* v. *State Line S. S. Co.*, 3 App. Cases, 72.

But Lord BLACKBURN did not lay down such a rule. He did say that if the cargo should be so loaded as to render the port inacessible, that the ship would be unseaworthy, but because *inaccessibility* creates *unseaworthiness*, it does not follow that the converse is true, and that *accessibility* produces *seaworthiness*.

As Lord BLACKBURN says in *Steel* v. *State Line S. S. Co.*, 3 App. Cases, 72:

"It will be a question, *taking the whole circumstances together*, was this ship reasonably fit to encounter the perils and was the damage that happened a consequence of her being unfit, if she was unfit. That question will have to be determined upon *the whole circumstances and the whole evidence*."

While knowledge *may be an important factor* in some cases, we do not consider that under the circumstances of this case, the appellant's liability depends alone upon lack of knowledge that the port covers were open or were insecurely fastened.

The exposed port was only two or three feet above the water line, and in a position where it would be submerged on a moderate roll of the ship. With her hatches battened down there would be no opportunity to close the port in time to prevent the inflow of some water under ordinary conditions. We therefore submit that the "Indiana" would have been unseaworthy, even though the officers were aware of the open port, and the failure to close it would not have been a "fault or error in the management."

The appellant's error is due to the failure to note the true distinction between those ports of the vessel which are *ordinarily* left open, and which, when so open, do not expose the ship to any danger, save under most extraordinary conditions, and between ports of a cargo hold, which *are never left open*, to which no attention is given during the voyage, and which, if open, expose the cargo to danger, under purely ordinary conditions.

In *Steele* v. *State Line S. S.*, *supra*, LORD BLACKBURN says:

"If this port had been, as a port in a cabin or some other place

would be, open, and when they were sailing under the lee of the shore remaining open, but quite capable of being shut at a moment's notice as soon as the sea became in the least degree rough, and in case a regular storm came on, capable of being closed with a deadlight—in such a case as that, no one could, with any prospect of success, ask any reasonable people, whether they were jury or judges, to say that that made the vessel unfit to encounter the perils of the voyage, because that thing could be set right in a few minutes, and there is always some warning before a storm comes on, so that they would have plenty of time to put it all right. If they did not put it right after such warning, that would be negligence on the part of the crew, and not unseaworthiness of the ship."

Of what value would be warning of a storm's approach, *in the absence of the knowledge that the port was open or insecurely fastened?* How would mere accessibility be effective, if there was no intention on the part of the officers to avail themselves of it?

The foregoing case and the following ones have held an intention to close the port to be material. This intention is based *upon* the practice to leave it open.

LORD HERSCHEL, in the case of *Hedley* v. *Pinkney & Sons S. S. Co.*, *supra*, follows *Steel* v. *S. S. Co.*, *supra*, saying that the "failure properly to secure many ports of the ship *which are in ordinary practice open, from time to time*," does not create unseaworthiness.

The same ruling was followed in the *Silvia*, *supra*. In delivering the opinion, Mr. Justice GRAY says:

> *"The ports were in a place where these shutters would usually be left open for the admission of light, and could be speedily got at and closed if occasion should require.*

In such cases, where the ports are ordinarily left open, initial unseaworthiness does not ensue, and there is only a duty to close them as circumstances may require. The failure to close them during the voyage is negligence on the part of the officers or crew of the vessel and an error or fault in management.

But as Judge DALLAS well says in his opinion in the

Circuit Court of Appeals:

"But in the present case the port in question was not designedly left open, and its shutters ought not to have been left unfastened. *They would not 'usually be left open for the admission of light,' or for any purpose. They were believed by all concerned to have been securely closed, and that they would remain so throughout the voyage. It was neither intended nor expected that they would require or receive any attention at sea. It was not supposed that any control of them in the course of navigation and management would be necessary, and no duty to exercise control existed, simply because no need nor occasion for it could have been foreseen or perceived.* If, as in the 'Silvia' case, the compartment in question had contained only tackle and stores, and if, as in that case, the glass cover had been closed but the iron cover left open to admit light, it would unquestionably have been the duty of the master, upon encountering rough weather, to have had the iron cover closed; *but he cannot be justly said to have committed either a fault or an error in omitting to remedy a defect of which he had no knowledge, and for the existence of which he was in no way responsible*"

These Propositions Seem Indisputable.

1. A glass covered port with an iron dummy back, both properly screwed down, cannot come open, unless defective (Record p. 25,) or knocked open by an extraordinary peril.

2. There is no evidence of any such peril.

3. Respondent claims that the covers were properly screwed down.

4. The covers were subsequently discovered to be open.

5. Therefore they were defective, or were opened intentionally.

6. But there is no evidence that any person opened them, but upon the contrary that the hatches were battened down by carpenters, and no other access possible.

7. Therefore the covers were defective.

If they had never been closed, manifestly the ship was unseaworthy.

If they were opened intentionally, it must have been before the ship sailed, because there is no evidence that the battened down hatches were ever taken off, until the water was discovered.

Respondent has not proved how they were opened, nor, if intentionally, by any one *connected* with the ship's navigation or management.

It is therefore submitted that the decree of the Circuit Court of Appeals for the Third Circuit, (reversing the decree of the District Court dismissing the libel), should be affirmed.

HORACE L. CHEYNEY,
JOHN FREDERICK LEWIS,
Of Counsel for Appellee.

722 Bourse Building,
Philadelphia.

Supreme Court of the United States.

No. 193.—October Term, 1900.

The International Navigation Company, Petitioner, *vs.* The Farr and Bailey Manufacturing Company.	On writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[April 22, 1901.]

This was an action brought by the Farr and Bailey Manufacturing Company against the International Navigation Company, owner of the steamship Indiana, in the District Court of the United States for the Eastern District of Pennsylvania, in admiralty, to recover the sum of $2,084.15, for damages to twenty bales of burlaps which were delivered to the Navigation Company at Liverpool, England, on board that steamship, in good order and condition, for carriage to the Manufacturing Company at Philadelphia. Upon the arrival of the steamship at Philadelphia the burlaps were found to have been damaged by sea water. The case was heard in the District Court and the libel sustained, and the cause referred to a commissioner to determine the extent of the loss. 94 Fed. Rep. 675. The Navigation Company applied for a reargument, which was had, and thereupon the libel was dismissed. 94 Fed. Rep. 678. From this decree the Manufacturing Company appealed to the Circuit Court of Appeals for the Third Circuit, and that court, one of its members dissenting, reversed the decree of the District Court, and held the Navigation Company liable. 98 Fed. Rep. 636. The case was then brought to this court on certiorari.

In the first opinion of the District Court it was stated that—

"In May, 1895, twenty bales of burlaps in good condition were received by the vessel in Liverpool, consigned to the libellant, in Philadelphia, and a bill of lading was given therefor. The bales were stowed with some other goods in compartment No. 3 of the lower steerage deck; but the compartment was not full, only one tier of cargo, two or three feet high, covering the floor, so that access to the ports was very easy and unobstructed. Four or five days after the vessel left Liverpool water was discovered in the compartment; and when the hatches were opened, a day or two later, it was found that the after port on the starboard side was admitting water freely as the vessel rolled. Both covers of the port were unfastened and open, but there was no sign of injury to either, or to the surroundings of the port. No severe weather had been encountered, and no accident was known to have happened to the vessel. The ports in the compartment were inspected the day before the vessel sailed, and were

believed to be closed; but several hours elapsed between the time of inspection and the time of sailing. The libellant's burlaps were injured by the water thus taken into the ship, and the present suit has been brought to determine the respondent's liability."

"We have little difficulty in coming to the conclusion that the vessel was a staunch boat, properly manned, equipped, and supplied, and that she was in all respects fit for the voyage, except in the one respect of which the libellant complains,—the condition of the after port on the starboard side in compartment No. 3."

And it was found "as a fact, that the port in question was either not fastened at all, or was insecurely fastened, when the vessel left Liverpool."

In the second opinion it was said:

"It seems to me that, although the owners of the vessel provided the proper equipment for the porthole under consideration, and although the failure to close it properly was due to negligence in the use of such equipment, nevertheless the result was unseaworthiness, because the vessel set sail with a hole in her side that was not only unknown to her officers, but was believed not to exist. She was, therefore, not in a condition to afford due protection to the cargo in this particular compartment. If the hole had been caused by collision while she lay at her berth, and she had been sent upon her voyage without repair, it could not be successfully asserted that she was seaworthy, although the proper tools and materials might have been among the ship's stores, and the failure to repair might be properly said to have been due to negligence in failing to use the equipment at hand."

The Circuit Court of Appeals said that—

"These goods were stowed in a compartment on the lower steerage deck in such manner as to admit of free access being had to the port through which the water subsequently entered. This port, and others similarly situated, were inspected on the day before the vessel sailed, and they were believed to be closed and properly fastened; but, after the Indiana had proceeded for four or five days upon her voyage, water made its appearance in the compartment, and a day or two later investigation disclosed that both the glass cover and the iron dummy of the port in question were open, and that through this opening the water was admitted. There had been no severe weather, no accident was known to have happened, and the port, its covers, fastenings, and surroundings, did not appear to have been in any way broken or impaired."

And found as to the port:

"The impression made upon us by the evidence is that it was probably closed, but, be this as it may, certain it is that it was not securely fastened; and we are of opinion that, by reason of this fact, the vessel was unseaworthy."

Mr. Chief Justice FULLER delivered the opinion of the Court:

Counsel for petitioner states that the question raised on this record is: "Was the Indiana unseaworthy at the time of beginning her voyage from Liverpool to Philadelphia, or was the failure to securely fasten the port

covers and keep them fastened a fault or error in the management of the vessel under the exemption of the 'Harter act?' "*

The courts below concurred in the conclusion that the Indiana was unseaworthy when she sailed because of the condition of the port hole, but the District Judge on the reargument felt constrained to yield his individual convictions to the rule he understood to have been laid down in *The Silvia*, 171 U. S. 462.

The Silvia was decided, as all these cases must be, upon its particular facts and circumstances. The case is thus stated by Mr. Justice Gray, who delivered the opinion of the court:

"The Silvia, with the sugar in her lower hold, sailed from Matanzas for Philadelphia on the morning of February 16, 1894. The compartment between decks next the forecastle had been fitted up to carry steerage pas-

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*Act of February 13, 1893, 27 Stat. 445, c. 105, entitled "An act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property." The first, second and third sections read:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

"SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in anywise be lessened, weakened, or avoided.

"SEC. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

sengers, but on this voyage contained only spare sails and ropes, and a small quantity of stores. This compartment had four round ports on each side, which were about eight or nine feet above the water line when the vessel was deep laden. Each port was eight inches in diameter, furnished with a cover of glass five-eighths of an inch thick, set in a brass frame, as well as with an inner cover or dummy of iron. When the ship sailed, the weather was fair, and the glass covers were tightly closed, but the iron covers were left open in order to light the compartment should it become necessary to get anything from it, and the hatches were battened down, but could have been opened in two minutes by knocking out the wedges. In the afternoon of the day of sailing, the ship encountered rough weather, and the glass cover of one of the ports was broken—whether by the force of the seas or by floating timber or wreckage, was wholly a matter of conjecture—and the water came in through the port, and damaged the sugar."

And again:

"But the contention that the Silvia was unseaworthy when she sailed from Matanzas is unsupported by the facts. The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport. The port holes of the compartment in question were furnished both with the usual glass covers and with the usual iron shutters or dead lights; and there is nothing in the case to justify an inference that there was any defect in the construction of either. When she began her voyage, the weather being fair, the glass covers only were shut, and the iron ones were left open for the purpose of lighting the compartment. Although the hatches were battened down they could have been taken off in two minutes, and no cargo was stowed against the ports so as to prevent or embarrass access to them in case a change of weather should make it necessary or proper to close the iron shutters. Had the cargo been so stowed as to require much time and labor to shift or remove it in order to get at the ports, the fact that the iron shutters were left open at the beginning of the voyage might have rendered the ship unseaworthy. *But as no cargo was so stowed, and the ports were in a place where these shutters would usually be left open for the admission of light, and could be speedily got at and closed if occasion should require, there is no ground for holding that the ship was unseaworthy at the time of sailing.*"

In the present case the compartment in which the burlaps were stowed was used exclusively as a cargo hold; the glass and iron covers were intended to be securely closed before any cargo was received; the persons whose duty it was to close them or see that they were closed, supposed that that had been properly done; and the hatches were battened down with no expectation that any more attention would be given to the port covers during the voyage; but in fact the port was not securely covered, and there was apparently nothing to prevent the influx of water, even under conditions not at all extraordinary, the port being only two or three feet above the water line.

We are of opinion that the difference in the facts between the two cases was such that the Court of Appeals was at liberty to reach a different result in this case from that arrived at in *The Silvia*. The latter decision

simply demonstrated the justness of Lord Blackburn's observation in *Steele v. State Line S. S. Co.*, L. R. 3 App. Cases, 72, that the question whether a ship is reasonably fit to carry her cargo must be "determined upon the whole circumstances and the whole evidence."

On the question of fact in this case, we have the concurrent decisions of the two courts that the Indiana was unseaworthy at the commencement of the voyage, and as we find no adequate ground to conclude that the finding was erroneous, the settled doctrine that it should be accepted is applicable. *The Carib Prince*, 170 U. S. 655.

But it is contended that in spite of the fact that the condition of the port hole rendered the ship unseaworthy when she sailed, the omission to securely cover it was a fault or error in management and within the exemption of the third section of the Harter act. The proposition is that if the owner provides a vessel properly constructed and equipped, he is exempted from liability, no matter how unseaworthy the vessel may actually be, at the commencement of the voyage, through negligent omission or commission in the use of the equipment by the owner's servants. Or, to put it in another way. If the unseaworthiness is not the result of error or fault in management, the third section does not apply, and even if it were, the exemption still cannot obtain unless it appears that the owner used due diligence to make the vessel seaworthy. And it is said that the owner does exercise such diligence by providing a vessel properly constructed and equipped, and that while he is responsible for the misuse or nonuse of the structure or equipment by his "shore" agents, he exercises due diligence by the selection of competent "sea" agents, and that he is not responsible for the acts of the latter, although they produce unseaworthiness before the commencement of the voyage.

We cannot accede to a view which so completely destroys the general rule that seaworthiness at the commencement of the voyage is a condition precedent, and that fault in management is no defense when there is lack of due diligence before the vessel breaks ground.

We do not think that a ship owner exercises due diligence within the meaning of the act by merely furnishing proper structure and equipment, for the diligence required is diligence to make the ship *in all respects* seaworthy, and that, in our judgment, means due diligence on the part of all the owners' servants in the use of the equipment before the commencement of the voyage and until it is actually commenced.

The ruling in *Dobell & Co.* v. *Steamship Rossmore Co.*, (1895) 2 Q. B. 408, is in point. The Rossmore left Baltimore with a port improperly caulked, which rendered the vessel unseaworthy, through the negligence of the ship's carpenter, who was a competent person. Sea water entered through this port and damaged the cargo. The bill of lading incorporated the Harter act by reference, and it was held, as correctly stated in the

syllabus, that "to exempt the ship owner from liability it was not sufficient merely to shew that he had personally exercised due diligence to make the vessel seaworthy, but that it must be shewn that those persons whom he employed to act for him in this respect had exercised due diligence; and that, therefore, the negligence of the ship's carpenter prevented the exemption from applying, and the ship owner was liable."

The obligation of the owner is, in the language of section two of the act, "to exercise due diligence, to properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage;" and that obligation was not discharged when this vessel sailed with a hole in her side, under the circumstances disclosed, whether the duty of seeing that it was closed devolved on officers of the ship, or the foreman of the stevedores, or on all of them. The obligation was to use due diligence to make her seaworthy before she started on her voyage, and the law recognizes no distinction founded on the character of the servants employed to accomplish that result.

We repeat that even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions. The word "management" is not used without limitation, and is not, therefore, applicable in a general sense as well before as after sailing.

It is, of course, not to be understood as intimated that failure to close port holes necessarily creates unseaworthiness. That depends on circumstances, and we accept the finding of the Circuit Court, and of the Court of Appeals, that it did so under the circumstances of this case.

Nor do we say that the liability rests alone on the ignorance of the officers that the port covers were not securely fastened. This is not a case where it appears that the port would ordinarily have been left open, to be closed as the exigency might require, and where failure to close it during the voyage might be an error or fault in management. The importance of this point is well illustrated by Dallas, J., in the Court of Appeals, thus: "But in the present case the port in question was not designedly left open, and its shutters ought not to have been left unfastened. They would not 'usually be left open for the admission of light,' or for any purpose. They were believed by all concerned to have been securely closed, and that they would remain so throughout the voyage. It was neither intended nor expected that they would require or receive any attention at sea. It was not supposed that any control of them in the course of navigation and management would be necessary, and no duty to exercise control existed, simply because no need nor occasion for it could have been foreseen or perceived."

Decree affirmed.